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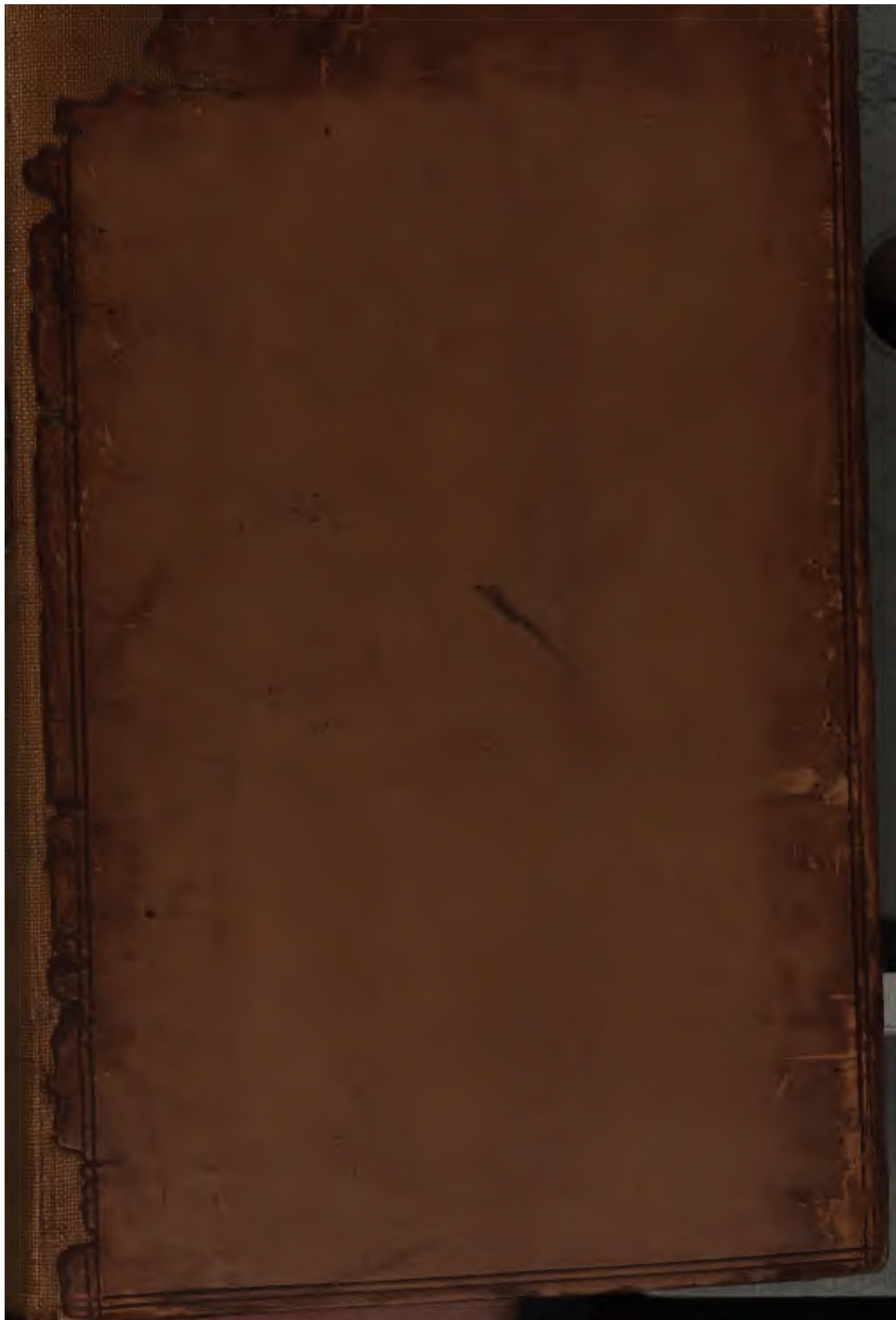
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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE

SIR WILLIAM PAGE WOOD, KNT.,
VICE-CHANCELLOR.



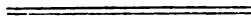
BY EDWARD E. KAY AND HENRY R. VAUGHAN JOHNSON

OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.



VOL. IV.

1857 & 1858:—21 & 22 VICTORIÆ.



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1859.



I HAVE been compelled, by the pressure of my other professional duties to relinquish during the last year and a half all connection with the editing of these Reports, except that my name has been printed on the cover.

For the same reason, I now withdraw my name; and the Editorship will in future belong, in name as well as in fact, to my friend Mr. JOHNSON.

I am desirous that the last words which I shall publish here should express my grateful sense of their kindness to those to whom I owe the privilege of having been, for a time, one of the Editors of this Series of Authorised Reports, and also to all members of both branches of the Profession to whose courtesy I have been constantly and largely indebted for assistance, which has very much lightened my labours as an Editor.

EDWARD E. KAY.

LINCOLN'S INN, *January*, 1859.



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LORD CRANWORTH	.	.	.	}	<i>Lord Chancellors.</i>
AND					
LORD CHELMSFORD	.	.	.		

SIR JAMES LEWIS KNIGHT BRUCE,	}	<i>Lords Justices.</i>
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AND					
SIR HUGH M'CALMONT CAIRNS,	.				

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REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR:

COMMENCING IN

THE LONG VACATION, 21 VICT. 1857.

1857.

HENRY AND OTHERS v. THE GREAT NORTHERN
RAILWAY COMPANY AND OTHERS.

V. C. WOOD,
Aug. 21st,
24th.

THE Plaintiffs were holders of preference stock in the
Great Northern Railway Company. The Defendants
were the Company and its Directors.

FULL COURT
OF APPEAL IN
CHANCERY,
Nov. 21st.

*Public Com-
pany—Railway
Company—*

*Preference Shares — Guaranteed Shares — Dividends — Interpretation of Act of Parliament —
Cumulative Remedy — Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 120 — General
Meeting of Company — Assent of Votes at — Onus of proving.*

Holders of stock or shares which are "to bear and receive dividends at a given rate per cent. per annum in preference to the payment of dividend on the ordinary shares of the company" are entitled to receive such dividends out of profits whenever accruing (and not merely out of the profits of the current half year or year, or of any other definite period) before any holder of ordinary shares can participate in any profits whatever.

Secus, had the stocks or shares in question been directed to bear and receive *half-yearly* or *yearly* dividends, or the like—*Semble*.

Therefore, where a fund, which under ordinary circumstances would have represented the half-year's profits of a railway, as shown at the usual half-yearly general meeting, was applied pursuant to the provisions of a special Act of Parliament in buying up fictitious stock, including preference stock fraudulently issued by a servant of the company, and no dividend was declared as previously for that half year:—*Held*, that all holders of preference stock or shares, such as first above mentioned, were entitled to be paid dividends out of subsequent profits before any payment could be made to any holder of ordinary shares; the loss occasioned by the issuing of such fictitious stock being in this respect like loss from ordinary accident or robbery, and as such to be deducted from gross receipts before the true profit could be ascertained.

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Dividends were duly paid in full upon the Plaintiffs' stock by half-yearly payments, up to the 30th of June, 1856, inclusive. But before another half-year's interest became due, it was discovered that at various times during the eight preceding years stock and shares of the Company, including preference stock similar to that held by the Plaintiffs, had been fraudulently created and issued by *Leopold Redpath*, a servant of the Company, by means of false entries in the books of the Company, and by fictitious transfers and otherwise, to the amount of £221,070, or thereabouts.

Under these circumstances, at the next half-yearly general meeting of the Company, held on the 12th of March, 1857, and which had been specially convened for the purpose, a report from the directors on the subject of *Redpath's* forgeries and frauds was read, together with a statement of the nett revenue of the Company, which shewed a balance of 243,923*l.* 5*s.* 8*d.* for the half year ending on

The Act contained a clause providing that the directors should apply any balance of the fund thereby directed to be applied for making good the losses above mentioned, in paying to the proprietors of preference stock or shares the dividends to which they would have been entitled out of the fund if the same had been declared and apportioned as dividend at the half yearly meeting:—*Held*, that the remedy thereby given to the proprietors of such preference stock or shares was cumulative, and by way of security to them for the amount of their dividend, and not in substitution of such dividend.

Whether the same interpretation would have been put upon this clause in case the preference shareholders had not been of right entitled as above to arrears—*Quære*.

Whether any difference exists between preference shares and guaranteed shares in reference to the right to arrears ut supra—*Quære*.

A company is empowered by Act of Parliament, with the assent of three-fifths of the votes at any general meeting, to guarantee the payment of dividends not exceeding a given percentage per annum on certain shares, in preference to the payment thereof on the ordinary shares of the company, and upon such terms as shall be by the resolution of such meeting defined. The company, having issued shares purporting upon the face of the certificate to be issued under the provisions of this Act, and having received the money and paid dividend upon it, cannot afterwards object, that, at the general meeting, three-fifths of the votes did not assent; still less can they object that the holders of such shares have not shown such assent, the onus being on the company so issuing shares to show informality—*Semble*.

Where a company, having power by Act of Parliament to issue stock with or without guarantee, issues stock purporting on the face of the certificate to be "issued under the provisions of the Act," such stock carries the guarantee, and not merely a preference—*Semble*.

No resolution of a company quâ company authorising division of a fund such as that above mentioned to purposes other than dividend can vary the rights of the shareholders inter se in reference to the general profits. *Secus*, where a particular class of shareholders, e. g., preference shareholders, grant proxies in that particular capacity, authorising a fund which would be appropriated in payment of their special dividend to be diverted to other purposes—*Semble*.

the 31st of December, 1856 ; and it was resolved that no dividend should be declared, but that the meeting considered it desirable that the balance of 243,923*l.* 5*s.* 8*d.* should be applied to meet the losses caused by the frauds and forgeries referred to in the Directors' Report ; and that the directors should be, and they thereby were, requested and authorised to apply the said balance, when and in such manner as they might consider most beneficial for the Company, and to take such proceedings in Parliament and otherwise as they might deem most conducive to the interests of the Company.

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In pursuance of this resolution no dividend was declared at the meeting, and nothing was paid to any of the holders of preference stock ; but the directors brought a bill into Parliament, to make provision with respect to the capital which had been fraudulently created ; and on the 10th of August, 1857, the bill was passed, and became an Act of Parliament.

By this Act, after reciting (*inter alia*) that it was expected that some part of the losses occasioned by *Redpath's* frauds and forgeries might be reimbursed to the Company, it was enacted, *first*, that all stock, of whatever description, and all shares in the Company, appearing upon the registers of stocks and shares on the 31st of January (when the register was last closed), were thereby declared to be valid, and to entitle the holders to all the rights, privileges, and advantages, and to subject the holders to all the duties and liabilities, which attached to the same stock or shares, or which would attach to the same if they had been all legally created and issued under the authority of the Company's Acts. *Secondly*, that the directors should apply the 243,923*l.* 5*s.* 8*d.*, and any moneys which should be received by the Company towards reimbursement of the

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losses, in repayment of all moneys expended by the Company because of such frauds and forgeries, and in payment of the costs, charges, and expenses resulting therefrom, inclusive of the expense of applying for, obtaining, and passing the Act, and in purchasing from time to time, at their discretion, stock or shares of the Company in each of the several capitals mentioned in the schedule, to the amount of the several stocks or shares of the Company so fraudulently created and issued, whether already or thereafter discovered; and they should forthwith cancel and extinguish the stock and shares so purchased: Provided always, that any purchases of stock or shares which the directors might have made pursuant to the resolution of the 12th day of March, were thereby ratified and confirmed, and the directors were thereby required forthwith to cancel and extinguish the stock or shares so purchased: Provided also, that after the purchase and cancelling and extinguishing thereinbefore directed, it should be lawful for the Company, or the directors thereof, to exercise all the powers theretofore vested in them for the creation and issue of capital, as fully as though no such stock and shares had been so fraudulently created and issued. *Thirdly*, that, if any balance should remain of the said sum and of the said moneys after such application thereof as thereinbefore directed, it should be lawful for the directors, and they were thereby required, to apply such balance, so far as the same would extend, in paying to the proprietors of the several classes of preference stock or shares the dividends to which they would have been entitled out of the 243,923*l.* 5*s.* 8*d.* if the same had been declared and apportioned as dividend at the half-yearly meeting of the 12th of March, 1857: Provided always, that all the proprietors of each class of preference stock or shares should receive their dividends according to the priority of the said class, and in preference to any subsequent class: Provided also, that, if the balance remaining after payment of the dividend to preceding classes of stock or

shares were not sufficient to pay the whole amount of the dividend of the next subsequent class, such balance should be divided rateably among all the proprietors of the same class of stock or shares according to the amount held by them respectively.

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The capital fraudulently created by *Redpath*, the dividend warrants fraudulently issued by him, and the costs, charges, and expenses attending the investigation of the frauds, together exceeded the balance of net revenue for the half year ending the 31st of December, 1856. But it was expected that the Company would recover from *Redpath's* estate sufficient to make good the deficiency.

The net revenue of the Company for the half year ending the 30th of June, 1857, amounted to upwards of £200,000, and was more than sufficient to pay to the Plaintiffs and the other holders of the preference stock their several dividends, to be computed from the 30th of June, 1856, to the 30th of June, 1857.

The half-yearly ordinary general meeting of the Company being now about to be held on the 29th of August, 1857, the Plaintiffs filed their bill on behalf of themselves and all other holders of preference stock in the Company, charging that the Defendants intended at the meeting to declare a dividend out of the net profits of the Company made since the last dividend was declared, and to pay dividends to the holders of original ordinary stock in the Company, without regard to the claim of the holders of preference stock to be paid, as the Plaintiffs charged they were entitled to be paid, the full amount of the dividends payable in respect of such preference stock from the 30th of June, 1856, before any dividend or payment should be made in respect of the original ordinary stock, and praying that it might be declared that the holders of preference stock

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in the Company were entitled to be paid interest or dividends on the amount of preference stock held by them from the 30th of June, 1856, according to the amount of interest or dividends which the classes of preference stock respectively carried, before any payment in respect of dividends or otherwise should be made to any of the holders of ordinary stock; that the Defendants might be restrained from declaring any dividend on the ordinary stock in the Company, without regard to such right in the holders of preference stock, and from making any payment for dividend or otherwise to any of the holders of ordinary stock, without first paying to the holders of preference stock the full amount of the interest or dividends payable in respect of the preference stock held by them, to be computed from the 30th of June, 1856, according to the amount of interest or dividends which such preference stocks respectively carried.

It appeared that the preference stocks in question were of four classes, known as The 5 per Cent. Perpetual, The first 5 per Cent. Redeemable, The $4\frac{1}{2}$ per Cent. Redeemable, and The second 5 per Cent. Redeemable Preference Stocks.

Of these, the first class purported upon the face of the certificates to be "issued under the provisions of the Company's Act of 1849," by which it was enacted, that it should be lawful for the Company, with the assent of three-fifths of the votes at any general meeting to *guarantee the payments of dividends* not exceeding in any case 7 per centum per annum on any particular shares which the Company might by any of the thereinbefore recited Acts be authorised to issue, in *preference to the payment thereof on the ordinary shares of the Company*, and upon such terms as should be by the resolution of such meeting defined: Provided always, that any preference

shares which should have been already issued by the Company, should have a preference or priority of dividend over the shares so guaranteed as aforesaid; and that all preference shares should have priority of dividend according to the date at which such shares should have been issued.

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The second class purported upon the face of the certificates to be "issued under the provisions of the Company's Act of 1851," by which the Company was empowered to raise further moneys by creating new shares, and with the like assent to guarantee the payment of dividends not exceeding 7 per cent on such shares, and on the shares which they were authorised to issue under an earlier Act of the Company passed in 1848, in preference to the payment of dividends on the ordinary shares of the Company, and upon such terms as should be by the resolution of such meeting defined: Provided always, that the granting of such preference or priority should not prejudice or affect any preference or priority in the payment of interest or dividend on any other shares which should have been granted by the Company in pursuance of, or which might have been conferred by, any previous Act, or which might otherwise be lawfully subsisting.

Further circumstances under which these two classes of stock were issued, and which are less material to the main question in the cause, will appear by the judgment (a).

The third and fourth classes of stock were expressed upon the face of their several certificates to be issued under the provisions of the Company's Acts of 1853 and 1855, respectively.

By the Act of 1853 it was enacted, that it should be lawful for the Company to raise by the creation of new

(a) *Infra*, pp. 21—25.

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shares any sum or sums of money not exceeding in the whole the sum of £750,000 in addition to the sums which they were already authorised to raise, or which they might be authorised to raise by any other Act to be passed in the then present session of Parliament; and that the capital so to be raised should be divided into shares of £10 each, *and should bear and receive dividends at the rate of 4l. 10s. per centum per annum in preference to the payment of dividends on the ordinary shares of the Company*, subject to a power in the Company to redeem the same upon six months notice at a premium of £10 per centum; and that such dividends should be calculated upon the instalments paid upon such shares from the time of payment of the same. And it was provided, that nothing therein contained should prejudice or affect any preference or priority in the payment of interest or dividend on any other shares or stock which might have been granted by the Company in pursuance of, or which might have been confirmed by, any previous Act, or which might otherwise be lawfully subsisting.

By the Act of 1855 the Company was empowered to raise a further sum by creating new shares; and it was enacted, that the holders of such shares should be entitled to the payment of fixed dividends thereon, or on so much thereof as might from time to time be paid up at the rate of £5 per centum per annum in preference to the payment of dividends on the ordinary shares of the Company, and upon such conditions as should be expressed at the time of the issue thereof; with a proviso saving the preference or priority of the existing shares or stock, similar to that in the Act of 1853, and a proviso enabling the Company to redeem the shares at a premium of £5 per centum.

The Chairman by his affidavit deposed thus:—"In creating the several classes of preference shares and stocks,

none of them are created as guaranteed shares, so as to entitle the holders thereof to receive any arrears of dividend for one half-year out of the net profits of the Company for any future half-year."

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Mr. *Daniel*, Q. C., and Mr. *E. R. Turner*, for the Plaintiffs, now moved for a decree as prayed by the bill.

They contended, that the holders of every class of preference stock mentioned in the bill were entitled to be paid in full, including all arrears (if any) upon their shares, before the holders of other stock could participate in any part of the profits whenever accruing. This right was not confined to the holders of preference stock issued under the Acts of 1849 and 1851; it extended also to the holders of shares issued under the Acts of 1853 and 1855. It depended neither upon the circumstance of stock being "guaranteed" a preference, nor upon the use of the words "fixed dividend." The mere stipulation "that the shares were to bear and receive dividends at a given rate per cent. per annum, in preference to the payment of dividends on the ordinary shares of the Company," was sufficient to give the preferential rights for which the Plaintiffs contended. This principle had been already decided in *Crawford v. The North Eastern Railway Company* (a). See also *Stevens v. The South Devon Railway Company* (b), *Sturge v. The Eastern Union Railway Company* (c); and compare the principle of the decision in *Jortin v. The South Eastern Railway Company* (d), since affirmed by the Lords Justices, and reversed by the House of Lords, but not as regards the right to arrears.

But the Plaintiffs were entitled to the relief prayed by

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|------------------------------|---------------------------------|
| (a) 3 K. & J. 723. | before the Lords Justices, 7 D. |
| (b) 9 Hare, 313. | M. G. 158. |
| (c) 24 Law Times, 181; S. C. | (d) 2 Sm. & Giff. 48. |

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their bill upon another and independent ground. The dividend (if any) about to be declared, must be for the whole period elapsed since the date of the last preceding dividend, that is, June 1856: Companies Clauses Consolidation Act (*a*), s. 120. That Act does not limit the Company as to the declaration of a dividend. It might be two, three, or four years before they did so: *Crawford v. The North Eastern Railway Company*. But the dividend, whenever declared, must be for the entire period since the last preceding dividend; and upon that ground only the Plaintiffs were entitled to an injunction and relief as prayed by their bill.

It would be argued that the Plaintiffs' rights in this respect were altered, as regards the dividend in question, by the Act of 1857. But that Act, by its preamble, expressly recognised the priority of preference stock, as enacted by the special statutes of the Company. It contained nothing in abrogation of that right, and a special statute does not derogate from a special statute without express words of abrogation: *Jenkin's 5th Century*, Ca. 11, cited by Lord Justice Turner in *The Trustees of The Birkenhead Docks v. Laird* (*b*). Here no such words could be found, even in the 3rd section of the Act—the only one on which the Defendants could rely in support of their contention; the true intent of that section being, to restore to its proper purposes the balance of the fund to which, by the preceding section, the Company were authorised to resort for the purpose of making good the loss occasioned by *Redpath's* frauds.

A dividend once declared creates a right in every person in whose favour it is declared: *Carlisle v. The South Eastern Railway Company* (*c*). It was therefore the duty of the

(*a*) 8 & 9 Vict. c. 16.

(*b*) 4 D. M. G. 742.

(*c*) 6 Railw. Cas. 670; S.C., 1 M'N. & Gor. 689.

Plaintiffs to obtain the aid of the Court before the proposed meeting.

The *Attorney-General* (Sir *R. Bethell*), Mr. *Denison*, Q. C., and Mr. *Rochfort Clarke*, for the Defendants—

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Objected in limine to the interference of the Court in a question which it was competent to the shareholders to decide for themselves. By the 120th section of the General Act (a), all questions relating to the declaration of dividends were left to the shareholders to decide at the general meeting now about to be held, and with which the bill sought to interfere; and whatever it is competent to shareholders to decide for themselves should not be interfered with by a Court of Equity: *Foss v. Harbottle* (b). The Plaintiffs represented but 135,000*l.* out of 3,452,462*l.* of preference stock. The vast majority of the preference shareholders were content to let the question rest, or at any rate to leave its decision to the general meeting. The body of shareholders had consented to be deprived of one dividend, on the full assurance that the losses sustained would be treated as a common misfortune, to be borne by a common contribution. It might be, that, according to the strict letter, the Act of 1857 had failed to carry out what was the real arrangement, and thus the preference shareholders might be able to escape contribution to the common calamity. But it would be fatal to the general interests of the Company for the Court to compel the shareholders to accept that conclusion at the next meeting.

Independently, however, of that objection, and supposing the Court should take upon itself to decide the question, the Plaintiffs must fail upon the issues of law which they had tendered. Their first proposition, that preference stock carried with it a right to arrears, could not be supported.

(a) 8 & 9 Vict. c. 16.

(b) 2 Hare, 461.

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That proposition confounded "preference" with "guaranteed" stock—two descriptions of property which were perfectly distinct, and were recognised as such by every one acquainted with the stock and share market, as the prices of shares in every day's share list testified. Guaranteed stock was entitled to arrears: preference stock was not; and here the affidavit of the Chairman was express:—"In creating the several classes of preference shares and stocks, none of them are created as guaranteed shares, so as to entitle the holders thereof to receive any arrears of dividend for one half year out of the net profits of the Company for any future half year;" and that affirmation was not contradicted. The Acts of 1853 and 1855 gave no power to the Company to guarantee dividends; and although power for that purpose was given by the Acts of 1849 and 1851, in neither case was it exercised.

[Their arguments on this point will appear from the judgment] (a).

All the cases cited in reference to the rights of preference shareholders were decided upon the particular language of the Acts of Parliament under which the stock in each case was issued. In *Sturge v. The Eastern Counties Railway Company* there was a guarantee and a special provision for arrears.

The Plaintiffs' second proposition, founded on the 120th section of the general Act, was equally unfounded. True, a dividend had not, in terms, been declared in respect of the half-year ending December, 1856; but a scheme had been prepared, as required by the 120th section, showing the profits of the Company during that period; and the Act of 1857 had appropriated those profits in a particular manner. That being so, the only scheme the directors could now

(a) *Infra*, pp. 24, 25.

exhibit at the proposed meeting, was an account of profits accrued since those which Parliament had so appropriated. And if the profits to be now divided were the profits for the half-year ending June, 1857, they must necessarily be divided, in respect of the dividend for that half-year; for dividends and profits must necessarily be co-incident in point of time.

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Upon the Plaintiffs' contention, the preference shareholders would have two dividends for the half-year ending December, 1856.

The VICE-CHANCELLOR.—Two funds for their dividend.

The *Attorney-General*.—Two dividends. The 3rd section of the Act of 1857 requires the directors to apply the balance of the profits for that half-year "in paying to the proprietors of the several classes of preference stock the dividends to which they would have been entitled out of those profits if the same had been declared and apportioned as dividend." The Act of Parliament is a substitute for the resolution of the shareholders. It has made the balance, be it £5 or £50,000, the dividend for the half-year ending 1856; and by the operation of the Act all accounts are settled up to that date.

Mr. *Daniel*, Q. C., by the direction of the Court, confined his reply to the question, whether the Plaintiffs were entitled to arrears, the Vice-Chancellor being of opinion, that, if they were, the Act had no effect upon them.

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He contended that the right to arrears did not depend upon the particular wording of any of the special Acts of Parliament, "guarantee," or "fixed dividends," or the like, but upon the broad ground that their shares were "to bear and receive dividends in preference to the payment of

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dividend on the ordinary shares of the Company"—words which were common to all the Acts, and to every class of shares.

The VICE-CHANCELLOR.—The argument has always been, that "dividend" is not the same as "interest;" you must make a profit before you can declare a dividend.

Mr. *Daniel*, Q. C.—But the fallacy of the Defendants' argument lies in the assumption that dividend and profit must be coincident in point of time; whereas there is nothing in any special statute of the Company, or in the General Railway Act, to authorise the Court in limiting the period during which the profit must be made in respect of which the dividend is to be declared.

Then, as to the argument, that, upon the Plaintiffs' construction, they will be paid twice over, that consequence will be easily prevented by a declaration that they are to accept what the Court gives them in full discharge of all claim in respect of their shares.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

The 3rd section of the Act of Parliament of 1857 has created a difficulty requiring much consideration. I was, therefore, anxious that the whole of this case should be most fully argued.

Whether the shares in question were preference shares, in such a sense as to entitle them to arrears, or not, in either event, except for the 3rd section of the Act, I should not have found any difficulty in the case; because it appears to me, that the purport and scheme of the Act are simply to

carry into effect an arrangement, by which, out of the ordinary profits realised by the Company in a certain half-year, and which would otherwise have been appropriated among the shareholders, a common calamity which has befallen the whole Company would be set right.

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As regards that calamity, I entirely coincide in the view taken by the counsel who first advised the Company, that it is to be viewed as any other calamity—the fall of a tunnel, the effect of an inundation, or the like ; and although, at first, it occurred to me that there might be some special case made for saying that the preference shareholders, as they are termed, ought to bear a proportion of the loss, regard being had to the forgery of their preference stock, which let in other persons to share in that stock, as well as to the difficulty by which they, in common with the other shareholders, were met in getting any dividend at all, independent of the Act, yet, upon further consideration—and even before hearing a reply—it did not appear to me that any such equity could attach to them. It appeared to me, that it was simply equivalent to a loss occasioned by the fraudulent conduct of a clerk, who might have absconded with a box containing the money that has been lost to the Company. Such a loss could be treated only as a common calamity, and could not, in the slightest degree, vary the position of the several proprietors of stock as between themselves. Like any other calamity, it would have to be met before profit could be realised ; and any profit which would afterwards be realised would be applied, like any other profit, in payment of shareholders according to their priorities of dividend.

Taking that view of the calamity that has befallen this Company, I should have no doubt whatever, were it not for the 3rd section of the Act of 1857, that the legal result of the contract, and the equitable right of the parties, after

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a fraud like the present had been committed, would be, that the loss which ensued should be borne out of the whole profits of the concern; and if that reduced the profits to nil, the next time profit accrued, such profit would be divided according to the contract into which the parties have entered. Accordingly, not merely pursuant to the strict letter of the 120th section of the Companies Clauses Consolidation Act (*a*), but in conformity with what is just and right between the parties, the next dividend would be declared according to the balance-sheet framed since the last declaration of dividend. At the meeting of the 12th of March, the Company, supposing them to have had power to *deal with* the fund as they then proposed to *deal with* it, would have brought themselves literally within the 120th section, by resolving that no dividend should be declared. That, in fact, was the resolution passed at the meeting of the 12th of March; and no dividend having been declared at that meeting, at the meeting which is now about to be held, the account would be made up for the entire year, ending the 30th of June, 1857. That account would show, that, in the first half of that year, no profit had accrued to be divided, nor had anything that could be called a dividend, in the strict sense of the term, been declared, or accrued to any one; and the Company being now about to divide their profits, the dividend would be computed from the last preceding period down to which the profits were divided, viz. the 30th of June, 1856—that is, the entire current year; and the preference shareholders would take their 5 per cent. or $4\frac{1}{2}$ per cent. out of the realised profit upon the whole of that year before anything could be paid to any ordinary shareholder.

In reference to the meeting of the 12th of March, and the resolution passed at that meeting, I will notice in passing an observation of the *Attorney-General* founded upon *Foss*

(*a*) 8 & 9 Vict. c. 16.

v. Harbottle (a), that the Company were the parties to direct what should be done with reference to declaring a dividend. That of course was so. They had full power to say whether there should or should not be a dividend; but, having contracted as a Company to give a preference to certain shareholders, they had no power to say 'we will pay those shareholders, to whom we have agreed to pay so much per cent., a less sum,' or in any way to vary their rights with respect to that sum. Nor indeed did they purport by this resolution to do anything of the kind, they only purported to authorise the directors at once to make good the losses that had occurred out of the fund in question.

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If I am to assume that the shareholders who have a preferential dividend concurred in that resolution,—and I do not see that it makes any essential difference whether I assume that or not—it could only be that they concurred as a portion of the Company, not as voting in their separate rights, and saying 'we authorise that fund which will be appropriated to our special dividend, if ever it comes to be declared, to be handed over for this particular purpose.' Had it been shown that proxies had been granted by the holders of these preference stocks individually, and in their capacity of preference shareholders authorising such an appropriation, it would have been a different matter. But this is simply a common vote of the Company, in which a resolution of the majority of the shareholders is binding. And no resolution of the Company, quâ Company, could possibly amount to a resolution which would in the slightest degree vary the rights of the shareholders of the different stocks.

If that be so, the question is, whether Parliament has varied those rights by the Act of 1857.

(a) 2 Harc, 461.

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As far as regards the 2nd section of the Act of 1857, it appears to me that Parliament did nothing more than give effect to the resolution of the 12th of March. All that is there enacted is, that the £243,000 and any moneys which should be received by the Company towards the reimbursement of the loss, should be applied in payment of all moneys expended by the Company owing to such frauds and forgeries, then in payment of certain costs and charges, and then in the repurchase, as they should think fit, of the stock, in order to cancel that which had been thus fraudulently created; and that, after such purchasing and cancelling, it should be lawful for the Company to exercise all the powers vested in them for the creation and issue of capital, as fully as though no such stock had been fraudulently created. But that was doing nothing more than what the shareholders were desirous to declare by their resolution, but could not achieve without the authority of Parliament. It does not indicate any intention on the part of Parliament to alter in the slightest degree the rights of shareholders to be paid out of profits according to their respective priorities.

This brings me to the 3rd section, which makes it a matter of considerable importance to discuss the question whether the preference shareholders are entitled to be paid out of profits whenever accruing—in other words, whether they are entitled to arrears before any dividend can be paid to any ordinary shareholder.

If the preference shareholders are so entitled to arrears, then the clause in question presents no difficulty. In that view, there is no indication in the Act of any intention on the part of the Legislature to deprive them of so important a right. The question is—and it is the whole point of the case as it seems to me—whether the remedy given them by the 3rd section is substitutional, or merely a cumulative remedy, in respect of their rights under their contracts with the Company. If their rights were, to be paid the

whole of their arrears, then I could not hesitate to say, that all that the Legislature meant by the 3rd section was this, 'You the Company have a certain amount of profit, out of which, after doing all that the 2nd section of this Act has directed to be done, a surplus may be found to remain even before another meeting is held. If so, that surplus will be realised profits, which the preference shareholders would have received, had not Parliament thought fit to take this out of their hands for a time; but you are not to delay them an hour beyond the time at which dividends can be declared. Therefore, you are not to deprive them of any balance which may remain, but are to apply such balance in payment of their dividends. All their ordinary rights will remain the same, and we leave untouched the rights of the preference shareholders under the contracts you have made with them, to receive, the one class, 5 per cent., the other $4\frac{1}{2}$ per cent., before the ordinary shareholders touch any money.' Surely, upon no reasonable construction of this Act can it be contended, that a right so important, so likely to be realised, having regard to the apparently prosperous condition of this Company, notwithstanding the fraud that had been perpetrated, is to be frittered away, simply because Parliament has said, 'if there be any surplus of this fund you shall be paid out of that surplus,' so that thereupon all other rights are to be extinguished. Such an extinguishment, if intended, would have been expressly provided for by the Act.

On the other hand, if the preference shareholders have no such right to arrears, then considerable difficulty is thrown upon the case by the clause in question. If Parliament looked upon the right of the preference shareholders, not as a right to receive 5 per cent. upon their stock before any other shareholder could touch any dividend—but merely as a right at each epoch of division of profits, whether periodical or not in the strict sense as

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to fixed period, to take their chance of as much as they could get up to 5 per cent., with no right, in the event of a deficiency at that particular epoch, to make good the arrears upon a subsequent division of profits—then the construction for which the Defendants contend would not be too unreasonable a construction to put upon the clause in question—in fact it would be difficult to construe it otherwise.

If such were their rights in the contemplation of Parliament, and if, added to this, the half-yearly payments at epochs are to be the true test, much might be said in favour of the Defendants' contention, that, upon the whole of the Act, the intention of Parliament was to give the preference shareholders whatever balance might remain after making good the losses occasioned by the fraud, and so finally to settle that half-yearly account. Then the 120th section of the general Act (*a*), which enacts that the profits shall be calculated for the period since the preceding ordinary meeting at which a dividend was declared, will not have application to a state of things such as this under the special Act, but the account must be taken for the last half year only, and the account for the previous half-year must be considered as settled by the 3rd clause. The strongest point of view in which it was put on behalf of the Defendants was this, that, if the account be taken for the entire year, a dividend would be declared for the entire year, upon which a right of action would arise, and that would be inconsistent with the 3rd clause, which provides, that, ultra that dividend, the preference shareholders are to be paid out of another fund.

It seemed to me, therefore, from the first, to be exceedingly desirable to come to a definite conclusion upon the question, (although I am by no means positive that

(*a*) 8 & 9 Vict. c. 16.

it is necessary to decide it), whether the preference shareholders are really entitled to arrears.

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A similar question came before me in a case referred to in the course of the argument; but there the difficulty was got over by my coming to the conclusion, that, upon the words of the special Acts of Parliament, the dividends were a charge upon the revenues of the Company. It appears to me that all these cases must be decided on the special provisions of each particular Act of Parliament.

As regards the two first classes of stock, the Five per cent. in perpetuity, and the First five per cent. redeemable, I have no great difficulty, even if the term "guarantee" is to be of that technical importance which the Defendants contend that I am bound to assign to it.

I set no value upon the conversation which takes place at meetings of the description in evidence before me, because, after all, one must judge of the result by what is embodied in the resolutions. Still, there is some little negative evidence arising from those discussions, for they do not at all show, to my mind,—or rather they tend to show the contrary—that the terms "preference" and "guarantee" have acquired a technical and settled distinction, to such an extent, that when you speak of "preference stock," all the railway world must immediately understand that you do not mean stock which carries arrears. "Guarantee" is not a technical word; "guarantee" is a legal word which we well understand, and upon which one would have to decide upon the force of the legal expression; but "preference" stock is a word in some degree different. And possibly it might materially affect my decision, if there was a common custom of business or trade, or whatever it might be called, by which every one was to understand, that, when he got preference stock, he

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was not to be guaranteed his preference; although this would not conclude the question, for to be "guaranteed," as I apprehend, gives a right of action against the Company, and the guarantee may be enforced by judgment, and that judgment might go to the whole of the goods of the Company, and would not depend upon whether there was a dividend or no dividend. The guarantee might not arise until the dividend was declared (that might or might not be so under the words used in the guarantee); but, whether it did so or not, guaranteed stock would not be the same thing as preference stock, but would have a different effect. The question, however, that arises here, is, whether everybody understands, when he is told that he has preference stock at 5 per cent., that he is to have half-yearly dividends and nothing else, and that he is not to have arrears. I cannot find that any such understanding has arisen; on the contrary, at one of the meetings referred to—that of the 7th of June—it is clear that no such distinction was present to the mind of any shareholder.

At this meeting of the 7th of June, 1849, when the Act of 1849 is pending in Parliament—whether with this clause in it or not does not appear, and, therefore, I will not assume that the clause was in it—a resolution is come to, that certain scrip shares are to be issued upon the terms and conditions recommended by the directors to the meeting, "each bearing 5 per cent. interest or preference dividend in perpetuity."

It was argued, that this might possibly mean interest for the year during which they are allowed to pay interest out of capital, or the like, which in some railway Acts is the case; but it appears to me clear, that there, as far as the resolution could go, they put interest and dividend in plain and distinct apposition—the one as being equivalent to the

other. The shares are to bear interest or dividend at that rate.

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Then comes the Act of 1849, which did not receive the Royal Assent until after the resolution was passed. That Act ratifies the cancelling of forfeited shares and issuing of new shares since the 5th of June; and then it is enacted —[His Honour read the clauses of the Act set out above (a)].

I think Mr. *Denison* is right in saying, that the 2nd of these clauses is a general clause, thrown in by the committee as a safeguard to meet any case of preference shares, meaning that no such shares should be prejudiced by this Act of Parliament—the Legislature not having opportunity to investigate whether or not preference shares had, in fact, been issued.

The next thing after that, is a meeting held on the 11th of August, 1849 (the Act now being passed); and at that meeting there is a report read, which refers distinctly to the resolution of the 7th of June, and states that the measures authorised by the extraordinary meeting of June last have been attended with complete success; and that, by a clause in the *Great Northern* Act, which had received the Royal Assent, Parliament had sanctioned the issue of those shares. Now, the Company are told by the report, that the shares which they are authorised to issue “bear interest or dividend in perpetuity at 5 per cent.,” that such shares have been issued, and that about 4000 of them have been taken. Then the report mentions difficulties arising from the whole of such shares not having been taken up; and that it is intended to give the registered proprietors of all classes the option of taking up the remaining 25,000 shares upon pay-

(a) *Supra*, p. 6.

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ment of 10*l.* 10*s.* a share; and this report is adopted by the whole body of the meeting unanimously.

Now, if a resolution of three-fifths of the proprietors be necessary to make a guarantee for payment of dividend not exceeding this amount, it appears to me clear that the proprietors had ratified completely, and perfectly, by their resolution at this meeting, all that had been done on the 7th of June; and what had been done on the 7th of June was the issuing of shares, "which should bear 5 per cent. interest or preference dividend in perpetuity." The whole title of the shareholder would depend upon those two resolutions, the one previous to the Act, and the other subsequent to the Act; and if he is told that he has got 5 per cent. preference stock issued under the provisions of the Act of 1849, I should be strongly inclined to hold that it would be too late for any Company, after having got this money, and paid dividend upon it, and received the full benefit of it without dispute or demur, and having issued those papers which are issued pursuant to the provisions of the Act, to sustain an objection founded upon three-fifths of the proprietors not having assented, if such an objection were made. Even the Courts of law have held in cases of this description, where no objection is taken, and where the Company avails itself of the benefit of the Act, that it is somewhat late for parties to come, and say, 'true it is, there was a meeting, but three-fifths did not assent;' still more, to come, and say, 'you do not show that three-fifths did assent;' certainly the onus is on the parties who took the benefit of this Act, to show that there was informality when they purported to issue shares in pursuance of the Act. It appears to me, as regards the Act of 1849, that the description of the shares would lead any shareholder to suppose that they were issued in conformity with the Act. And it appears to be the sound construction of the Act,

that it must be taken most strongly against the persons to whom the money is to be advanced, and that the stock issued by them is to be taken as stock which is duly issued. If it were necessary to determine here the question of guarantee, upon the Company's having complied or not with the provisions guaranteeing the payment of dividend on this stock, it seems to me that the words "issued in pursuance of the Act," imply that the whole issue was made with a guarantee of the payment of dividend if three-fifths of the votes consented.

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Mr. *Denison* gave an answer to one observation which I made, which applied distinctly to the Act of 1851, but did not apply quite so strongly to the Act of 1849, because there are some general words which might give the power of issuing preference shares independently of that Act;—but, as regards the Act of 1851, there is no power to issue preference shares except under the clause which speaks of guaranteeing the payment. His answer was, I think, ingenious, that, there being a larger power,—namely, the power of guaranteeing—that implied the smaller power of issuing preference stock. But, unless there be this settled and well-understood difference (which I have not arrived at, at all, upon the face of these proceedings,) between holders of stock of this description, that when you simply say, "dividend on preference shares," no such right is to accrue, it does appear to me, that if you hold out to the shareholder that you are issuing the stock by that description, and that it is pursuant to the provisions of the Acts of 1849 and 1851, he will take it to be guaranteed under the power of those Acts, and the onus will lie upon you to show that you are not deceiving the public in issuing stock—expressed to be issued under those provisions—but including all the provisions except the guarantee. Having a certain power,—namely, the power of issuing with or without guarantee—can you say that an issue "under the provisions of

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the Act," does not carry the guarantee, but only a preference.

It appears to me to be less important to discuss that point now, inasmuch as I cannot divest my mind of the conclusion upon the subsequent Acts—the Acts of 1853 and 1855—which simply give dividends at a fixed rate in preference to any dividend to ordinary shareholders, that what was intended to be given must be a fixed share of the whole profits of the concern before any other shareholder gets any share in such profits. That extends to the whole profits, for it is very important to observe, that neither the Companies Clauses Consolidation Act, nor either of these special Acts, lays down any time at which the dividend is to be made. It rests entirely with the Company to say when they will divide profits.

The Acts of 1853 and 1855 are nearly in the same words—for I agree with Mr. *Daniel*, that the term "fixed dividend" in the latter makes no difference in the two cases; and by the first of those Acts it is enacted, that the Company shall be authorised to raise shares "which shall bear and receive dividends at the rate of $4\frac{1}{2}$ per cent. per annum in preference to the payment of dividend on the ordinary shares of the Company." And the Company is empowered to redeem the same on six months notice. Had it been "half-yearly dividends," or "yearly dividends," or the like, as it is in the special Act of 1848 (a), then indeed the case would have been the other way; then it would be plain

(a) The Act of 1848 empowered shareholders who had paid up half the amount of any share or shares, to require each share to be converted into two half shares, one to be denominated "deferred half-share," the other "guaranteed half-share;" and it was thereby enacted, that thenceforth, in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued, should be applied in payment, in the first place, of interest or dividend at 6 per cent. on the

that the division of profits was to take place half-yearly or yearly, and that out of the half-year's or the year's profits, and out of those only, the holders of preference shares were to have the dividends mentioned in the Act; but here it says "dividends at the rate of $4\frac{1}{2}$ per cent. per annum." Now the word "dividend," in its most narrow and restricted sense, can mean nothing less than a share of *the profits* of the Company. And if there is nothing in the Act to cut it down to a share of the *half-yearly* or *yearly profits*, or to any other definite period whatever, why am I so to confine it, why am I not to hold that the true construction of the Act is, that the holders of this stock shall take out of the profits of the Company *whenever they may accrue* 4 per cent. per annum from the date of the advance, before any other person shall take a farthing out of the profits of the Company at any time of division? It is like the case pressed upon me, with a different view, of an ordinary partnership. It is one thing if the partnership deed provides that the profits shall be divided annually; but if that be not the case—if it be simply a partnership for so many years, and the deed provides, that out of the profits one partner shall have so much per cent. upon his capital before any profit shall be received by any of his other partners, that partner will have at any distance of time the right to call for his $4\frac{1}{2}$ per cent. before a farthing of the profits can be touched by any other partner; and if he has not been paid his $4\frac{1}{2}$ per cent. when the rest choose to make a dividend, he may say 'Those profits are mine. I was to have a dividend amounting to $4\frac{1}{2}$ per cent. per annum. I have not got it; and until I have got it, you cannot have any share.'

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It does not appear to me to be any straining of the Acts of 1853 and 1855, to hold that this is their true construction. On the contrary, if I must resort to any other con-

amount paid upon the half-share	alone be payable to the half-
so denominated "guaranteed,"	share so denominated "deferred."
and the remainder, if any, should	

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struction, not only is it contrary to the true construction of the Acts, "dividend" in its narrowest sense meaning "share of profits," but might be productive of the greatest possible inconvenience. It may not be the case with this, which is a successful Company, supported by wealthy men, who may have absorbed, to a great extent, the preferential shares; but in many, I may say, in the majority of Companies, strangers are brought in as holders of such shares when the original shareholders are nearly ruined. The original shareholders take the benefit of the capital so brought in, and stipulate to pay preferential dividends at 5 per cent. The majority clearly can have no right, as every one must see, to alter that bargain; but what they cannot do directly, they may do with the greatest ease and without fraud by another course. To put the case beyond all question of fraud, suppose them to have half-yearly dividends, not making them for the occasion, but dividing half yearly, and repeating that division from year to year. Suppose, then, that they wish to speculate upon a larger amount of profit, by carrying on business to a larger extent with an increased number of carriages and locomotives. All this would be fair. Now suppose they were to say, 'let us make this outlay whenever there is only just enough to pay the preferential shareholders, and nothing to pay us;' and suppose this to be done;—the preferential shareholders would bear the whole burthen of paying for the whole of the rolling stock; they would lose, to that extent, their dividends for that half year; and the next half year, if this construction be correct, they would have no claim whatever in respect of their loss. Presently, when the outlay had been made, and the business had increased in consequence, the Company might have a large fund coming in, and the ordinary shareholders would be entitled to divide it; in other words, they would get, by force of this construction, a dividend—that is, a share of the profits—before the holders of the preference shares had received dividends,

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For these reasons, I am very strongly of opinion, that if you announce, that, by an Act of Parliament, certain shareholders are to have dividends amounting—some to $4\frac{1}{2}$ per cent., others to 5 per cent. per annum (that is to say, a share of the profits to that amount)—in preference to the payment of any dividend upon the ordinary shares of the Company, you must take care that the persons to whom you give this preference receive dividends to these amounts out of the profits of the Company (whenever accruing), before you take one sixpence for any dividend to the shareholders, whom I may term the ordinary shareholders of the concern. Having come to that conclusion as to the rights of the preference shareholders, independently of the Act of 1857, it appears to me, for the reasons I have already given, that no intention to the contrary is apparent on the face of that Act. There is no natural equity but what is the other way. The calamity which has befallen the Company does not affect the rights of the shareholders inter se, but is a common loss, to be paid for out of the general assets of the Company; and such being the loss, the profit is diminished accordingly. What remains of profit should be divided according to the stipulation made between the parties; and if that stipulation is, that the preference shareholders are to have a given amount of interest out of profits, it cannot be a sound construction of the Act, to hold that this right is taken from them merely because the Act provides, that, in the possible event of there being a surplus (which surplus would belong, as realised profits, to the preference shareholders), it shall be paid to them, or that the consequence of enacting that they shall not lose their right to be paid out of that particular portion of the profits, is to transfer their right to be paid out of all other profits, whenever accruing, to the ordinary shareholders, or to allow the ordi-

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nary shareholders to touch profits without first fulfilling their engagements. Parliament might well contemplate that it would be all settled before the next half-yearly meeting, according to the view they take in dealing with the funds; and, therefore, the true construction of the Act would be:—‘You shall not deprive the preference shareholders of any interest they have in the existing fund. Other funds we leave to be dealt with as the law directs them to be dealt with. We are content to secure to them any surplus there may be out of this fund. That, at least, they shall have towards the satisfaction of their demand.’

No difficulty arises from the circumstance, that, upon this construction of the 3rd section of the Act, the preference shareholders would have a right of action when the surplus is ascertained, and acquire a right of action upon the next division of profits, because the answer would be: ‘You are only to get so much per cent. before the ordinary shareholders touch profits, and you have already been satisfied aliunde.’ That may well be provided for by a declaration, that, according to the true construction of the 3rd section of the Act, the remedy thereby given to the preference shareholders is cumulative, and by way of securing to them the payment of the full amount of their dividend, and not in substitution of that dividend. After such a declaration, they could not possibly make any demand; for it would thereby appear that they had been paid, and that the Act was merely a further security.

Questions as to whether such remedies are cumulative, are not new. Such a question was raised in *The Great Northern Railway Company v. Kennedy* (a), where it was argued, that there could not be a forfeiture of shares, because the Company had availed themselves of another

(a) 6 Railw. Cas. 5.

remedy; but the Court held that the remedies were cumulative.

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NORTHERN
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Taking the view I have done as to the right of the preference shareholders to be first paid out of all profits, whenever accruing, the construction of the Act is clear. It is not necessary for me to say more, than that I have not clearly arrived at a conclusion that it must receive a different construction, even upon the assumption that the preference shareholders have not that right. Had I taken that view, I should have felt more doubt upon the question. The arguments to which I have already adverted, particularly that as to double payment, would have been entitled to more weight in reference to the question whether the provision made by the 3rd section of the Act was not intended to be substitutional for the half-year, so as to amount to an account settled.

[His Honour recapitulated these arguments, and proceeded—]

I felt much pressed by the argument as to the double payment. But even in the most limited view as to the rights of the preference shareholders, I am not clear that the Legislature can be held to have positively taken away the right which existed in these preference shareholders, not having expressed such an intention more distinctly than they have done, or that their intention might not be to give to the preference shareholders at once, and before the period for making the yearly dividend, a chance of payment out of the surplus; or that they might not have contemplated—an event which the success of the railway seems to have prevented—that the frauds, being so extensive, might delay for a considerable period the payment of any dividend. It is sufficient for me to say, that I should certainly have taken a longer period for consideration, had I

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entertained the view that the rights of the preference shareholders are to depend upon what in one case would be the mere accident of the period at which the Company may choose to declare their dividend, or upon what in another case would be designated by a stronger expression than the term accident; because there might be many ways in which the interest of the ordinary shareholders would conflict with that of the preference shareholders, and in which, (without attributing the slightest fraud), the ordinary shareholder might be found to take every advantage of which he could by law avail himself; even in that more limited view as to the rights of the preference shareholders, the point would not by any means have been reduced to a certainty, although it would have put me in a position of more doubt than I feel upon the case as it now stands, entertaining as I do a very decided opinion, that shares constituted as these have been under the two last Acts—which are not so strong in favour of the Plaintiffs' contention as the two first Acts—entitle the holder to say, 'nobody shall have any portion of the profits of the Company, until I have been paid my 4½ or 5 per cent. dividend.'

*Minute of
 Decree.*

DECLARE that the Plaintiffs and the other holders of preference stock on whose behalf they sue, are entitled to be paid dividends out of the profits realised by the Company on the amount of preference stock held by them respectively from the 30th of June, 1856, according to the amount of dividends which the said several classes of preference stock respectively carry, before any payment in respect of dividends or otherwise is made to any of the holders of ordinary stock in the Company.

RESTRAIN the Defendants, the Company, from declaring any dividend on ordinary stock without regard to the rights of the Plaintiffs and the other holders of preference stock on whose behalf they sue, to be paid in priority the full amount of the dividends payable upon

or in respect of the preference stock held by them, to be computed from the 30th of June, 1856; and from making any payment for dividend or otherwise to any holders of ordinary stock, without first paying, or providing for the payment, to the several holders of preference stock, of the full amount of the dividends payable upon or in respect of the preference stock held by them, to be computed from the 30th of June, 1856.

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DECLARE, that, according to the true construction of the the 3rd section of the Act of 1857, the remedy thereby given to the preference shareholders is cumulative, and by way of security to them for the amount of their dividend, and not in substitution of such dividend.

ORDER the Defendants, the Company, to pay the costs of the suit.

The Defendants appealed from this decree. The appeal was heard before the Lord Chancellor (Lord *Cranworth*) and the Lords Justices. Their Lordships reserved judgment, and on the 21st of November dismissed the appeal with costs.

Nov. 21st.

1857.

Nov. 2nd &
3rd.

*Production of
Documents—
Privileged
Communications—Evi-
dence in the
Cause—Solicitor—Agent
abroad.*

Answers to inquiries addressed by Defendants to their agent in the *Falkland Islands* by direction of their solicitor, for the purpose of procuring evidence in support of Defendants' case, are within the rule as to protection.

The true test in such cases is, not whether the person who is at a distance and transmits the information is the agent of the solicitor and sent out by him, but whether in transmitting that information he was discharging a duty which properly devolved on the solicitor, and which would have been performed by the solicitor, had the circumstances of the case admitted of his performing it in person.

LAFONE v. THE FALKLAND ISLANDS
COMPANY. (No. 1.)

MOTION for production of documents admitted by the Defendants to be in their possession, and to relate to the subject matter of the suit.

Among the documents of which production was sought was a report made to the Defendants by one *Thomas Hevers*, an agent of the Defendants, residing in the *Falkland Islands*.

With reference to this report, the solicitor of the Defendants deposed as follows :—"I say, that the whole of the information contained in such report was collected by the said *Thomas Hevers*, and that such report was made in consequence and in pursuance of the instructions sent out by me as such solicitor as aforesaid, through *George Hinde Cripps*, the managing director of the said Company, for the purpose of procuring the necessary evidence in support of the Defendants' case."

The Defendants consented to produce this report, but claimed to be at liberty to seal up certain passages, on the ground of privilege.

As to the passages so sealed up, the solicitor by his affidavit deposed as follows :—"I say, that the said passages are in answer to the inquiries which I as the solicitor of the said Company directed the said *G. H. Cripps* to make, for the purpose of procuring evidence on behalf of the Defendants in this suit."

Mr. *Rolt*, Q. C., and Mr. *Giffard*, in support of the motion, contended, that the Defendants were not entitled to have the passages in question protected from production on the

ground of privilege. The doctrine as to privileged communications had never been extended to correspondence passing between a Defendant and his agent, other than the solicitor in the suit. It had been applied to communications between the solicitor and his client's witness, as in *Curling v. Perring* (a); also to communications addressed to the solicitor in the cause by his own clerk or his own agent, employed by him in collecting the evidence necessary for supporting the Defendant's case, as in *Steele v. Stewart* (b). But *Hevers* was neither a witness nor the agent of the solicitor in the cause. He was simply the agent of the Defendants; and the communications in question had been addressed by him to the Defendants themselves, not to their solicitor.

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v.
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LAND ISLANDS
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(No. 1.)
Argument.

The VICE-CHANCELLOR.—In *Steele v. Stewart* letters addressed to the Defendant were held to be privileged.

Mr. Rolt.—But simply because the person who wrote them was “acting by the direction and as the agent of the Defendant's solicitors” in procuring the requisite evidence.

Mr. Willcock, Q. C., and Mr. Hardy, for the Defendants, contended that the case fell within the authorities above referred to, and cited, further, *Reid v. Langlois* (c).

Mr. Rolt, Q. C., in reply.—In *Reid v. Langlois* the letters were written for the purpose of being communicated to the Defendant's legal adviser. That cannot be said here.

Nov. 3rd.

The following cases were also cited:—*Greenough v. Gaskell* (d), *Goodall v. Little* (e), *Glyn v. Caulfield* (f), and *Betts v. Menzies* (g).

(a) 2 My. & K. 380.

(d) 1 My. & K. 98.

(b) 1 Phill. 471.

(e) 1 Sim. N. S. 155.

(c) 1 M'N. & Gor. 638.

(f) 3 M'N. & Gor. 463.

(g) 3 Jur., N. S., 885.

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LAND ISLANDS
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(No. 1.)

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

With regard to the main question, I cannot hold that these documents are not protected, without overruling the decision of Lord *Lyndhurst* in *Steele v. Stewart* (a), which, of course, I am not competent to do.

It seems to me that the principle there laid down by Lord *Lyndhurst* is, that the true test is not whether the person who is at a distance, and communicates the information in question, is the agent of the solicitor and sent out by the solicitor, or the agent of the Defendant and sent out by him;—as Lord *Lyndhurst* there says, he may have been sent out by the Defendant, and yet, in collecting the information, he may have acted under the direction and as the agent of the solicitor—but the true test is, whether such person in transmitting that information was discharging a duty which properly devolved upon the solicitor, and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person.

The previous decision of Lord *Cottenham*, when Master of the Rolls, in the case of *Curling v. Perring* (b), although it might not extend the principle, went further, in some respects, than any case which had then been previously decided. There the solicitor, for the purpose of obtaining evidence in the cause, had entered into a correspondence with a witness. It was urged, that the relation of solicitor and client did not exist between the solicitor and a witness, and that the correspondence between them was not protected. But Lord *Cottenham* held that it was; for it would be impossible—resting it again on the same ground of necessity on which all these cases as to protection are decided—for

(a) 1 Phill. 471.

(b) 2 My. & K. 380.

persons to have their causes fairly conducted, unless solicitors were protected in all their communications with such persons as they supposed capable of giving evidence in favour of their clients.

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—
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v.
THE FALK-
LAND ISLANDS
COMPANY.
(No. 1.)
—
Judgment.

Then *Steele v. Stewart* went a step further, for there the protection was extended not merely to correspondence that had passed between a witness and the solicitor, but to letters written by a person who had been sent abroad to obtain evidence in the cause, and addressed some to the solicitor and others to the Defendant himself. Lord *Lyndhurst* then came to the conclusion, that, notwithstanding the person in question had been sent out by the Defendant, and notwithstanding he was acting as the agent of the Defendant as well as of the solicitor, still, in collecting and transmitting the information of which production was sought, he was performing duties which the solicitor or his clerk would under ordinary circumstances have performed, and was to be considered, therefore, as his agent; and that the communications transmitted by him, whether to the solicitor or to the Defendant himself, were to be protected.

In the case before me, it was clearly the duty of the Defendants' solicitor to prepare the evidence requisite to support the Defendants' case. With respect to the passages of the report which are sealed up, he deposes that they are in answer to inquiries which he, as the solicitor of the Defendants, directed *Cripps* (the managing director of the Defendants,) to make, for the purpose of procuring evidence on behalf of the Defendants in the suit. The solicitor could not conveniently go himself to the *Falkland Islands*. Here, as in *Steele v. Stewart*, the matter in litigation was at a considerable distance, and probably it was not convenient to send one of his regular clerks for such a purpose. He, therefore, applies to the managing director of the Company, describes to him the evidence he requires in support of the

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(No. 1.)*Judgment.*

Defendants' case, and directs him to communicate with the Company's agent in the *Falkland Islands*, and desires him to procure the evidence required and transmit it to *England*. That agent procures the requisite evidence and transmits it to *England*, and, of course, he transmits it for a purpose which will bring it within the rule as laid down by Lord Lyndhurst in *Steele v. Stewart*. It is true, the solicitor does not go on to depose that it was transmitted to the Defendants in order to be communicated to him, otherwise the question would have been simply a repetition, in so many terms, of that in *Steele v. Stewart*. But it is clear, from the affidavit, that this was the purpose for which he directed the Defendants, or rather the managing director, to procure it; and that it has been so procured for the purpose of being communicated to the solicitor, and in order that it may be made use of as evidence in the cause.

I feel the more bound to maintain, in its strictest form, this rule as to the protection of documents communicated under circumstances like the present, inasmuch as I have myself held—I believe in this very case—and I am not aware that my decision has been overruled, that, under the new practice, it is competent to a Plaintiff, after filing replication, to obtain an order for production of documents. And I see clearly the mischief that would now result from any invasion of the privilege that was maintained sacred in *Steele v. Stewart*, of allowing to a solicitor the liberty of free and uninterrupted communication as he may think fit, and through any agent he may wish to employ, with reference to the evidence to be procured for the defence of the case he has in hand. Unquestionably, he would be hampered and fettered in a proper defence of his case, if, at any time after issue joined, he were to be exposed to a fresh demand for all the documents he has so procured for the defence of the suit. *Steele v. Stewart* appears to have been intended to meet a case like the present under the old

practice; and if the rule thus maintained was necessary then, à fortiori is it necessary under the existing practice of the Court.

There must be an order for production of the documents, except the passages sealed up, as mentioned in the affidavit.

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LAFONE
v.
THE FALK-
LAND ISLANDS
COMPANY.
(No. 1.)
Judgment.

LAFONE v. THE FALKLAND ISLANDS
COMPANY. (No. 2.)

Nov. 4th & 5th.

SUMMONS adjourned from chambers.

The Plaintiffs had applied in chambers for an order calling upon the Defendants to produce at *Stanley*, in the *Falkland Islands*, and at *Monte Video* in *South America*, before the special examiners, on the examination of witnesses in the cause, certain documents, of which production had been ordered before any examiner of the Court, in the usual form.

The Plaintiffs' solicitor deposed that counsel had advised, and he believed it to be the case, that production of the documents at *Stanley* and *Monte Video* was necessary for the full and complete examination and cross-examination of the witnesses.

Mr. *Rolt*, Q. C., and Mr. *Giffard*, in support of the application, contended, that unless the original documents signed by one of the Defendants' witnesses were placed in his hands upon cross-examination, it would be hopeless to cross-examine him.

Jurisdiction—
Documents—
Order for
Removal of,
abroad—Ex-
amination of
Witnesses.

This Court will not order original documents to be taken out of the jurisdiction of the Court for the purpose of their being produced before a special examiner on the examination of witnesses in the cause, unless a special case be made for that purpose.

But the Court has jurisdiction, upon a special case being made, to make such an order
—Semble

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 LAFONE
 v.
 THE FALK-
 LAND ISLANDS
 COMPANY.
 (No. 2.)
 Argument.

Mr. *Willcock*, Q. C., and Mr. *Hardy*, for the Defendants, submitted, that the Court had no power to order original documents to be taken out of the jurisdiction. The Court could have no control over the persons taking them. Besides, they might be lost at sea; and, in this case, if the originals were lost, the Defendants' cause also would be lost.

The VICE-CHANCELLOR.—As to the perils of the sea, it is the constant practice to order documents to be brought to this country from abroad.

Mr. *Willcock*, Q. C.—But the effect of such an order as that is to bring the documents within the jurisdiction—not to remove them out of it.

The VICE-CHANCELLOR.—I doubt whether the Plaintiffs could cross-examine the witness upon a copy—the original being in existence.

Mr. *Willcock*, Q. C.—We would consent to waive that objection.

Mr. *Rolt*, Q. C., in reply.—But it does not rest with you to consent. We have a voice in that question, and we do not consent. The witness is your witness, and you are bound to produce him where we can effectually cross-examine him, or to allow us so to do by sending the originals abroad.

Judgment reserved.

Nov. 6th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I find, upon inquiry, that none of the registrars of the Court has ever known of any instance of an order for

taking papers out of the jurisdiction, for the purpose of their being produced before an examiner.

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LAND ISLANDS
COMPANY.
(No. 2.)

Judgment.

I am far from saying that this Court has not jurisdiction to make such an order. On the contrary, it appears to me, that cases might well exist in which it would be right and proper, for the sake of justice, to order original documents to be carried out of the jurisdiction, all proper care, of course, being taken, by way of indemnity or otherwise, to secure their safe return. But I think that a special case ought to be made to justify an order, which hitherto, so far as I can find, is without precedent.

I must, therefore, refuse the application. But I would rather reserve the question of costs, unless the parties can agree that they shall be costs in the cause; for, until the hearing, I shall not know the consequences of the inconvenience.

PURSER v. DARBY.

Nov. 5th.

IN September, 1855, *Joseph Darby*, since deceased, and the Defendant *Swindell*, being seised in fee of certain closes of land, agreed to sell them to the Plaintiffs for an estate of inheritance in fee simple.

Vendor and
Purchaser—
Contract to sell
—Vendor de-
vising to Infants
—Specific Per-
formance—
Costs of Suit
for.

Pending the agreement, and on the 9th of June, 1856, *Joseph Darby* made his will, and thereby devised all his share, right, and interest in the land, of which the closes contracted to be sold formed part, to his sons, the Defendants (two of whom were still infants), and their heirs, as

Where, after
contracting to
sell land, the
vendor devises
to parties, some
of whom are
infants at his
decease, his
estate must

bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract; and a mere devise of trust estates does not in such a case avoid the necessity of a suit.

Distinction in this respect between suits rendered necessary as above by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate leaving an infant heir.

1857.
PURSER
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Statement.

tenants in common, subject to the payment of all debts, liabilities, and engagements affecting the same.

The will contained a devise of the testator's mortgage and trust estates to two of his sons, whom he also appointed executors of his will.

The testator having died without completing the contract, the Plaintiffs now filed their bill against the testator's five sons and *Swindell*, praying that the Defendants might be decreed specifically to perform the agreement in such manner as, regard being had to the death of *Joseph Darby*, the same ought now to be performed; that the infant Defendants might be declared to be trustees for the Plaintiffs; and that some proper person might be appointed to convey in their place.

The Defendants submitted to perform the contract, but objected to pay the costs of the suit. They adduced evidence, to show that the delay in the completion of the sale was occasioned by a negotiation entered into by the Plaintiffs before the death of *Joseph Darby*, with a view to a part of the purchase money being allowed to remain upon the security of their note of hand.

Nov. 5th.
Argument.

Mr. *Rolt*, Q.C., and Mr. *Renshaw*, for the Plaintiffs, contended, that, *Joseph Darby* having rendered the suit necessary by devising the property to infants after he had agreed to sell it to the Plaintiffs, the costs should be borne by his estate. Had the deceased made his will before entering into the contract, or had he died intestate leaving an infant heir, in either case it might have been just to give no costs on either side; but there is a substantial difference between such cases and a case like the present, where the deceased, after entering into a contract, has deliberately placed the

property in another, who probably might not be able to complete it. Having entered into the contract, it was the duty of the deceased to abstain from placing the property in such a position; and, having failed in that duty, his estate should bear the costs: *Wortham v. Lord Dacre* (a).

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PURSER
v.
DARBY.
—
Argument.

Mr. *Bernard* for the Defendants, the devisees and executors of *Joseph Darby*, submitted that this was not a case for costs.

On a decree for specific performance against the infant heir at law of a vendor, the Court, where there has been no default on either side, will give no costs to either party: *Hanson v. Lake* (b), *Hinder v. Streeten* (c). And although, in *Wortham v. Lord Dacre*, a distinction was taken by the Court between a case of intestacy and a case where the property had been devised since the date of the agreement, there was still a conflict of authority on the question whether in the latter case the estate of the testator should bear the costs. Besides, admitting it to have been the testator's duty, as laid down in *Wortham v. Lord Dacre*, to take care that the property should not be placed in such a position that the contract could not be completed, was it true, as the Plaintiffs contended, that he had failed to perform that duty? At the date of his will, the testator was, quoad the property he had contracted to sell, a trustee for the Plaintiffs, and he had taken the precaution of devising all his mortgage and trust estates.

The VICE-CHANCELLOR.—But so far as regards the property comprised in the contract, he was merely a constructive trustee; and I have held—and the decision has been since affirmed,—that where there is merely a constructive and not an express trust, a devise of trust estates does not supersede the necessity of a decree.

(a) 2 K. & J. 437. (b) 2 Y. & Coll. 328. (c) 10 Hare, 18.

1857.
 PURSER
 v.
 DARBY.
 —
Argument.

Mr. *Bernard* then contended, that, the delay having arisen from the desire of the purchasers to pay the purchase money in a particular manner, the Court could not visit the vendor's estate with costs, citing *Hinder v. Streeten*.

Mr. *Louis*, for the Defendant *Swindell*.

The VICE-CHANCELLOR.—He must have his costs.

[*Farrar v. The Earl of Winterton (a)* was also cited.]

A reply was not heard.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The costs of this suit must clearly fall on the vendor.

Where a vendor dies intestate after entering into a contract for the sale of lands, leaving an infant heir, and a suit is rendered necessary by that circumstance, or by what may be called the mere act of God, there it may be right to give no costs on either side; but where, as here, the deceased person first contracts to sell, and then devises his property so that upon his death it becomes vested in infants, there the necessity for the suit cannot be said to have arisen from the mere act of God. The testator by his own voluntary act has made the suit necessary, and his estate, therefore, should bear the costs.

As to delay, it appears to me that the ground alleged is not so entirely for the convenience of the purchasers as to throw upon them any part of these costs.

Darby's estate, therefore, must bear the Plaintiffs' costs of this suit; and as between his representatives and their

(a) 4 Y. & Coll. 472.

Co-defendant *Swindell*, it was the necessity for the suit that occasioned his being brought here: the Plaintiffs, therefore, must pay *Swindell's* costs and have them over against *Darby's* estate.

DECREE as prayed. The Plaintiffs to deduct their own costs and those of the Defendant *Swindell* out of *Darby's* moiety of the purchase money.

1857.
PURSER
v.
DARBY.
Judgment.

Minute of
Decree.

HARE v. BURGESS.

BY indenture, dated 1836, *Paul Lord Methuen* granted and demised to Sir *John Hare*, his heirs and assigns, six acres of land in the city of *Bristol*, reserving mines and minerals: Habendum to Sir *John Hare*, his heirs and assigns, for the lives of *Charles Hare*, *Robert Leonard*, and *Thomas Harris*, at the yearly rent therein mentioned. And the said *Paul Lord Methuen* did thereby, for himself, his heirs, executors, and administrators, covenant, grant, and agree with and to Sir *John Hare*, his heirs and assigns, that in case Sir *John Hare*, his heirs or assigns, should, upon the decease of either of them the said *Charles Hare*, *Leonard*, and *Harris*, be desirous of taking a further or renewed lease of the said demised premises for another life, and should, within the space of twelve calendar months next after such decease, give notice in writing of such desire unto Lord *Methuen*, or the person or persons for the time being entitled to the reversion of the premises expectant on the determination of the demise thereby made, and should nominate any person in the room or stead of the person who should have so departed this life,

Nov. 11th &
12th.

Lease—Perpetual Renewal
—Covenant for.

Although, prima facie, a lessor shall not be taken to have intended to enter into a covenant for perpetual renewal, yet if there be in the lease expressions indicative of such an intention, the Court will give effect thereto.

Lease for lives, with a covenant on the death of either of the cestuis que vie to execute a renewed lease at the same rent and subject to the same covenants "including this present covenant:"—

Held, a covenant for perpetual renewal, and lessee entitled to have inserted in the renewed lease a covenant for renewal totidem verbis with that contained in the original lease, but with the name of the new cestui que vie substituted for that of the deceased.

Distinction as to the form of the renewed lease, in this respect, where the reversion has become vested in a trustee.

1857.
 HARE
 v.
 BURGESS.
 —
Statement.

Paul Lord Methuen, or the person or persons for the time being entitled as aforesaid, would, at the request and at the costs and charges of Sir *John Hare*, his heirs or assigns, and on the surrender of the present lease, on payment of the sum of 134*l.* 5*s.* by way of fine or premium for such renewal, forthwith duly make and execute unto Sir *John Hare*, his heirs or assigns, a new and further lease of all and singular the premises thereinbefore demised, for and during the natural life of the person so to be nominated, and the lives of such of them the said *Charles Hare*, *Leonard*, and *Harris*, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisoes, and agreements, "including this present covenant," as were therein contained. And further, that if, within the said period of twelve calendar months after the decease of any one of them, the said *Charles Hare*, *Leonard*, and *Harris*, and before any renewed lease or leases should have been granted of the said demised premises by virtue of the covenant therein contained, any other or others of the said *Charles Hare*, *Leonard*, and *Harris* should depart this life, then it should be lawful for Sir *John Hare*, his heirs or assigns, if he or they should think proper, to add or insert another life or lives in the lease so to be granted as aforesaid in the room of the life or lives which should so drop, he or they paying unto Lord *Methuen* or the person or persons for the time being entitled as aforesaid, within the said period of twelve calendar months after the dropping of the first life, the further sum of 134*l.* 5*s.* in respect of the said life or each of the said lives, as the case might be, which should be so inserted in the said lease, it being the intention of the said parties, that Sir *John Hare*, his heirs or assigns, should not be obliged, unless he or they should think proper, provided he should renew within the period aforesaid, to incur the expenses of a further or additional lease or leases

in respect of the said second and third lives dying as aforesaid ; provided nevertheless, that in case Sir *John Hare*, his heirs or assigns, should neglect or refuse, within the space of twelve calendar months next after the decease of such one of them the said *Charles Hare*, *Leonard*, and *Harris* as should first die, to give unto Lord *Methuen* or the person or persons for the time being entitled as aforesaid, or leave for him or them, at his or their dwelling house or respective dwelling houses, notice in writing of his or their desire to renew the said lease, naming one or more person or persons in the room of him or them who should have departed this life, or should neglect to pay such fine as aforesaid forthwith after the expiration of such notice, or to execute a surrender of the present lease or a counterpart of the said lease so to be granted, at and under the rent, and with the covenants, provisoes, and agreements thereinbefore contained, (including the covenant for renewal), according to the true intent and meaning of the said indenture, then and in such case all right and benefit of renewal by virtue of the said covenant thereinbefore contained should lapse and determine, as effectually as if the said covenant had not been inserted in the said indenture.

In 1853, the Defendant *Edward Burges* purchased and took a conveyance to himself and his heirs of the reversion of the premises expectant on the determination of the said demise.

In August 1855, *Charles Hare* died, and *John Strachey Hare* was nominated in his stead, and a new lease applied for pursuant to the covenant. The Defendant declined to grant a new lease, alleging that the original lease had been forfeited. A suit was then instituted by the Plaintiff for specific performance of the covenant. And by the decree the Defendant was ordered specifically to perform the cove-

1857.

HARRIS
v.
BURGES.

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nant for renewal contained in the indenture of 1836, and, upon payment of the fine for renewal and arrears of rent, and the costs and charges of the Plaintiff, to execute to him a new lease of the premises according to the terms of the covenant for renewal.

The parties proceeded to settle a lease in chambers, when a draft lease was brought in by the Defendant's solicitors, reciting the original lease of 1836 with the covenant for renewal in extenso, and purporting to demise the premises "with the full benefit and advantage of the covenant for renewal thereinbefore recited as contained in the said indenture of lease, so far as the same remains to be performed, but subject to the provisions as to such renewal."

The Plaintiff's solicitors objected to the draft as not containing an express covenant for renewal totidem verbis with that contained in the original lease, but writing the name of *John Strachey Hare* for that of *Charles Hare*, deceased.

The question being adjourned from chambers.

Argument.
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Mr. *Cairns*, Q. C., and Mr. *Wickens*, for the Plaintiff, contended that the covenant in the original lease was, in effect, a covenant for perpetual renewal, and the Plaintiff was entitled to have inserted in the lease to be executed in pursuance of it, a covenant in precisely the same terms, with this only difference, that the name of the new life would be inserted instead of that of the deceased.

The Defendant was absolute owner of the reversion. He had the beneficial interest, and was not merely a trustee. This distinguished the present case from *The Copper*

Mining Company v. Beach (a), and *Hodges v. Blagrove* (b), where trustees were held to be exempted from the duty of entering into covenants for perpetual renewal.

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In *Baynham v. Guy's Hospital* (c), it was said, that this Court leans against a construction for perpetual renewal unless clearly intended. But the leaning of the Courts is not so now ; and on the terms of the covenant in that case they would at the present day hold differently, as is clear from *Sadlier v. Biggs* (d). Moreover, *Baynham v. Guy's Hospital* is inconsistent with other authorities, and particularly *Atkinson v. Pillsworth* (e), which was not cited. The same remarks were applicable to *Moore v. Foley* (f).

Besides, in none of the cases which can be cited in support of the Defendant's contention, was there a covenant that the renewed lease should contain the same covenants, "including this present covenant," i. e. the covenant for renewal. Upon the Defendant's construction, he must either disregard those words altogether, or enter into a covenant totidem verbis with the original covenant for renewal, and to take effect upon the decease of either of the three original cestuis que vie, one of whom is already dead.

Mr. Dart, on behalf of mortgagees in the same interest with the Plaintiff, in the absence of direct authority upon the subject, referred to the practice of conveyancers. The leaning of the Courts being against perpetual renewals, and a proviso in general terms, that the lease to be granted should contain all the same covenants and agreements as the lease containing the covenant, having been repeatedly held not to extend to the covenant for renewal,

(a) 13 Beav. 478.

(b) 18 Beav. 404.

(c) 3 Ves. 295.

(d) 4 H. L. C. 435.

(e) 1 Ridgway's Parl. Cas. 449.

(f) 6 Ves. 232, 237.

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the practice of conveyancers, where the parties intend that the renewed lease shall contain a covenant for renewal, has been to employ in the original lease a special form of covenant, with the view of plainly and unequivocally expressing that intention (*a*); and the form so adopted by them is totidem verbis with that which, in the present case, is contained in the indenture of 1836. The form is found among Mr. *Jarman's* "Precedents" (*b*); and in reference to the words "including this present covenant," he observes in a note: "The effect of these words is to make the covenant for renewal perpetual, and the consequence of omitting them would be that no such covenant would be inserted in the new lease" (*c*).

The lease in the present case being clearly framed upon this form in Mr. *Jarman's* Precedents, and with the intention of binding the lessor to a perpetual renewal, and vast numbers of other leases having no doubt been framed upon the same precedent with a like object, the effect of a decision in favour of the construction for which the Defendant now contends, will be to invalidate many titles.

That the words "including this present covenant" were not intended merely for the purpose of giving a right to three renewals, is clear from the passage beginning "it being the intention of the said parties" at the conclusion of the further covenant; that passage showing that the parties contemplated that the lessee would be entitled to three renewals under the covenant contained in the original lease.

Mr. *Batten*, for the Defendant *Burges*, contended—first, that, according to the true construction of the original lease, the Plaintiff was entitled to three renewals and no more. The covenant for renewal contained in the original

(*a*) 4 Jarm. Conv. 394. (*b*) Id. p. 566. (*c*) Id. p. 567.

lease was not a covenant for perpetual renewal. The leaning of the Courts is strongly against construing a covenant in favour of perpetual renewal; and, if any other construction can be put upon its language, they adopt it: *Baynham v. Guy's Hospital* (a), and *Moore v. Foley* (b). Such was the law formerly, and it is a mistake to suppose that it has been altered by recent decisions. See *Brown v. Tighe* (c), decided as late as 1834, which shows that a covenant for perpetual renewal must be clear, plain, and distinct, and in terms that will bear no other construction (d).

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The VICE-CHANCELLOR.—It would be a forced construction of the words “including this present covenant,” to say that they would be satisfied by repeating, in the renewed lease, the original covenant for renewal totidem verbis, and for the lives of persons one or more of whom would be dead. The construction you suggest must be a reasonable one, to enable you to avail yourself of the authorities you have cited.

Mr. Batten.—The words in question would be satisfied by inserting, in the first renewed lease, a covenant to renew on the dropping of either of the two surviving lives, for instance, *Leonard* and *Harris*, without mentioning *J. S. Hare*, the new cestui que vie. If that construction is considered forced, how much more so is the Plaintiff's, who seeks to insert the name of a total stranger in the covenant for renewal, and yet calls it “this present covenant.”

The words of the covenant in *Moore v. Foley* (e) were not less difficult to deal with than the present, and yet were held not to amount to a covenant for perpetual renewal, “the Courts leaning against that construction.

(a) 3 Ves. 295. (b) 6 Ves. 232. (c) 2 Cl. & F. 396.

(d) Id. 416.

(e) 6 Ves. 232.

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unless there be words so clear as to make it impossible to construe them otherwise."

The VICE-CHANCELLOR.—I do not find, in any of the cases you have cited, the words "including this present covenant."

Mr. *Batten*.—But the Court finds words equally strong. And here the words in question were not only not superfluous, but were necessary upon the construction for which the Defendant contends; for, without them, the Plaintiff would have been entitled to but one renewal: *Iggulden v. May* (a); whereas, we admit he was intended to have three, although we deny his right to more.

If the parties to the original lease had really contemplated a perpetual renewal, they would have made their intention clear beyond all dispute, by providing, that, in case any life named in the original or any future lease should drop, a new lease should be granted, including this present covenant.

But, secondly, even if the Plaintiff be entitled to a perpetual renewal, the Court will not compel the insertion in the lease, which is now to be granted, of an express covenant for renewal.

The insertion of such a covenant will have the effect of fastening an obligation upon every person who may hereafter become entitled as an assignee to the reversion of this property, and will be binding upon the assets of every such person indefinitely. The Defendant, if the Plaintiff is entitled to perpetual renewal, is in effect no better than a trustee; and the form of the new lease should be as in *The Copper Mining Company v. Beach* (b) and *Hodges v.*

(a) 7 East, 237.

(b) 13 Beav. 478.

Blagrove (a), which is precisely that tendered by the Defendant's solicitors.

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The Court rose before hearing a reply.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

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—
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I have been considering this case since the Court rose yesterday, and I do not find it necessary to call for a reply.

Two questions were raised : first, whether the covenant in the original lease amounted in effect to a covenant for perpetual renewal ; and if it did, then, secondly, whether, under the circumstances of this case, the Defendant could be required to enter into an express covenant for renewal ; or whether the Court would not hold, as in *The Copper Mining Company v. Beach* (a), that a new demise reciting the original covenant would be a sufficient performance of that covenant.

As regards the first and main question, I must hold, that the covenant in the original lease is in effect a covenant for perpetual renewal. Mr. *Batten* argued, that this question must never depend upon mere inference ; that, in the absence of words indisputably pointing to a perpetual renewal,—words so strong that it is impossible to adopt any other construction,—the Court, although it may find in the instrument words apparently pointing to perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the terms of the covenant.

To that view I cannot accede. It seems to me, that the true rule of construction in a case like this, is that referred to by Lord Justice *Turner* as Vice-Chancellor in

(a) 18 Beav. 404.

(b) 13 Id. 478.

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Rochford v. Hackman (a), where he says that some effect must if possible be given to all the words of an instrument; and if the Court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in the way, it will construe them in that manner. The Court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument, that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal,—that *primâ facie* a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention; and, if there be, the Court will not force the construction, but will give effect to what appears to have been the lessor's intention.

In the present case, the covenant is, that in case the Plaintiff shall, upon the decease of either of the three original lives, be desirous of taking a renewed lease of the demised premises for another life, and shall, within twelve months after such decease, give the requisite notice, and shall nominate any person in the room of the deceased, the person entitled for the time being to the reversion shall execute a new and further lease of the premises *for the life of the person so to be nominated, and the lives of such of the three first-named persons* as shall be then living, and of the survivors and survivor of them, at the same rent, and with and subject to such and the same covenants, provisoes, and agreements, "*including this present covenant,*" as are contained in the original lease. And then there is a further covenant, that, if within the twelve months after the decease of any one of the three original cestuis que vie, and before any renewed lease or leases shall have been granted by virtue of the former covenant,

(a) 9 Hare, 483.

any other or others of the three shall die, it shall be lawful for the Plaintiff, his heirs or assigns, to insert another life *or lives* in the lease so to be granted as aforesaid in the room of the life or lives which shall so drop, upon making certain payments, it being the intention of the parties that the Plaintiff shall not be obliged, provided he renew within the period appointed, to incur the expense of a further or additional lease or leases in respect of the second and third lives dying as aforesaid.

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Now, suppose the event for which the further covenant provides to take place—suppose all the three original lives to drop within the twelve months, and before any renewed lease has been granted,—to carry out the construction for which the Defendant contends there ought to be an express proviso, that, in the lease to be granted in that event, the covenants for renewal shall not be included; for it would be absurd to suppose that there is to be a renewed lease for the lives of three persons, all of whom will be dead at the time of its execution.

It was argued that the words “including this present covenant,” would be satisfied by inserting in the first renewed lease a covenant to renew on the dropping of either of the two surviving lives. But that is not a natural construction. Such a covenant would be applicable to only two lives, whereas the original covenant is applicable to all the three. The true construction is clearly this—that, on the death of any of the three, the Plaintiff is entitled to a new lease for three lives, with a like covenant for renewal, *mutatis mutandis*, that is, writing in such covenant the name of the new life instead of that of the deceased.

Looking to the history of leases of this description, it becomes still more clear that this is the true construction. The struggle has always been this: the Court has felt,

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that, where the covenant has been merely in general terms, however large,—where, for instance, it has been a covenant to grant a renewed lease “under the like rents, covenants, and conditions as were contained in the original lease,” or “with all the covenants and conditions contained in the original lease,”—to construe that as amounting to a covenant for perpetual renewal would be a surprise on the lessor. It therefore refused to imply, upon a covenant so worded, an intention on the part of the lessor that it should operate as a covenant for perpetual renewal. That being the rule of the Court in construing a covenant so generally worded, conveyancers have taken this course: finding that the Courts would not imply such an intention, they have said, “we will express it.” And the course they have taken in order to express it has been, to add to the general words which the Courts have held as necessary to imply such an intention, the words “including this present covenant.” That this has been the history of the law in these cases, is clear from the able work to which Mr. *Dart* referred me as illustrative of the practice of conveyancers, which, in reference to such a question, may properly be taken into consideration.

Mr. *Batten* says, that if the parties to the original lease really contemplated a perpetual renewal, they would have made their intention clearer, by some such words as these: “in case in this *or any future* lease any life should drop, a new lease shall be granted including this present covenant.” Such words might have had that effect, but it appears to me that they were not necessary to express what was intended.

With regard to the second question, it was argued, that, even if the Plaintiff were entitled to a perpetual renewal, the Court would not compel the insertion in the lease which is now to be granted of an express covenant for renewal,

upon the ground that the insertion of such a covenant would have the effect of fastening an obligation upon every person who may hereafter become entitled as an assign to the reversion of this property for all time, and be binding upon the assets of every such person indefinitely ; and *The Copper Mining Company v. Beach* (a) was cited as an authority to show, that a new demise reciting the original covenant would be a sufficient specific performance. But, after much consideration, I am unable to see any principle upon which to hold that in the present case an express covenant for renewal ought not to be inserted. The notion of its being objectionable on the ground of tending to a perpetuity is out of the question. The moment any assign of the reversion grants a renewed lease, his duty is discharged, and his assets, therefore, are free from any liability. And as to *The Copper Mining Company v. Beach*, all that was there decided was, that, under a decree for specific performance, the Courts will not compel parties, who are trustees, to enter into covenants into which, under ordinary circumstances, trustees would not be called upon to enter. But that rule has no application to a case where, as here, the person in whom the reversion is vested is entitled to the beneficial interest ; in such a case, the Court will act in respect of a covenant like the present in the same manner as it acts in the case of ordinary covenants for title under a decree for specific performance. And the Defendant in this case having the beneficial interest in the reversion, and having purchased with notice that a covenant for perpetual renewal would be required of him, the Court will require the insertion of such a covenant in the lease in question.

As to costs, the case is new, and the decision in *The Copper Mining Company v. Beach* afforded some excuse for the draft as prepared by the Defendant's solicitors. I shall, therefore, give no costs on either side.

(a) 13 Beav. 478.

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Pleading—Answer—Exceptions—Discovery—Costs.

Where there is a specific averment, an interrogatory founded thereon must be specifically answered. A general denial is not a sufficient answer to a specific charge

Therefore, where the averment was, that land was conveyed to one J. S., and the interrogatory was whether such land was not conveyed to one J. S., "or to some and what person or persons?"—*Held*, that an answer, stating conveyances to persons other than J. S., and adding that, save as therein appeared, the person answering could not set forth whether the land in question was or not conveyed to one J. S., or to some or what person or persons, was evasive.

Costs.—Where exceptions to an answer are allowed, costs do not follow as of course, but must be asked for expressly by the successful party.

(a) Vol. 3, p. 549.

EARP v. LLOYD.

IN this case, already reported at an earlier stage (a), the Defendants had filed a concise statement, and interrogatories, to be answered by the Plaintiff. In their concise statement, they averred, inter alia, that, in or before the year 1799, a piece of land, which they described, was conveyed to one *Joseph Smith*; and, upon this averment, they founded an interrogatory, whether, at the time they had mentioned, or some other and what time, the piece of land so described was not conveyed to one *Joseph Smith*, "or to some and what person or persons, or how otherwise."

The Plaintiff, by his answer, stated that the land in question had been conveyed successively to several persons, whom he named, but without noticing *Smith*; and, in answer to the interrogatory mentioned above, he said, that, save as thereinbefore mentioned and as thereafter appeared, he could not set forth, &c., whether, in or before the year 1799, or &c., the land in question was or not conveyed to one *Joseph Smith*, or to some or what person or persons, or how otherwise.

The Defendants excepted to the Plaintiff's answer as insufficient.

It appeared, from the concise statement of the Defendants, that the fact of the alleged conveyance to *Joseph Smith* formed an essential part of their case.

Mr. *James*, Q. C., and Mr. *Speed*, for the Defendants, contended, that the answer was evasive. The form "save

as hereinbefore mentioned &c.," might have been sufficient if the Plaintiff had anywhere mentioned a conveyance to *Smith*; but he had not. The Defendants had averred a specific conveyance to *Smith*; had interrogated the Plaintiff as to that specific conveyance, and they were entitled to a specific answer. A general denial was no answer to a specific averment (a).

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Mr. *Rolt*, Q. C., and Mr. *Jolliffe*, for the Plaintiff, contended that the answer was sufficient. The interrogatory was, whether, at a particular time, or some other &c., the premises were not conveyed to *Smith*, "or to some and what person or persons?" In other words, "Tell us all the persons to whom the property has been conveyed." The Plaintiff answered that by enumerating all he knew of, and said he knew of no more. If the averment as to *Smith* was so important as to require a separate and specific answer, the interrogatory should have been separate and specific:—"Whether the premises were not conveyed to *Smith*, or whether or not to some other person, &c." According to the rule as laid down by Vice-Chancellor *Wigram* in *Tipping v. Clarke* (b), the true test in all cases where, as here, there is an averment that the person answering can make no discovery, "except as appears by other parts of the answer," is this: Can you find in any part of the answer a clear and sufficient statement, which, to a reasonable extent, meets the whole case. Here the Court could find such a clear and sufficient statement. The Defendants wanted to know all the persons to whom the property in question had been conveyed, and the Plaintiff had told them all he knew of, and that he knew of no more. That answer met their whole case.

A reply was not heard.

(a) See *Tipping v. Clarke*, 2 Hare, 389.

(b) 2 Id. 383.

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VICE-CHANCELLOR SIR W. PAGE WOOD.

This answer is clearly insufficient. It may be unintentionally so ; but it is what this Court considers evasive.

The rule has always been, that, where there is a specific averment, an interrogatory founded upon that specific averment must be specifically answered ; a general denial is not a sufficient answer to a specific averment.

Here the specific averment is, that the land in question was conveyed to *Smith*, and there is an interrogatory founded upon that averment, "whether it was not conveyed to *Smith*;" and the only question is, whether, because the pleader has gone on to add the words "or to some and what person or persons," the Plaintiff is relieved from answering specifically as to *Smith*.

Mr. *Jolliffe* admits, that, if the words "whether or not" had been inserted, so as to divide the interrogatory into two distinct branches, he must have answered it specifically as to *Smith*. But it appears to me that the omission to insert those words is immaterial. The interrogatory is in effect as much divided as if they were inserted; and the fact of their being omitted, does not relieve the Plaintiff from the necessity of answering specifically as to the alleged conveyance to *Smith*.

Formerly, when interrogatories were not so common as they are now, a Defendant was required to put in an answer to the averments in the bill, whether interrogated as to those averments or not. The principle upon which that rule depended remains unaltered; and it seems to me, therefore, that the mere circumstance of the pleader having added to an interrogatory, in itself sufficiently specific, the words "or some and what person or persons," is immaterial.

Then the way in which the Plaintiff has answered that interrogatory is this:—He says, that, save as appears by other parts of his answer to which he refers, he cannot set forth whether the property was conveyed to *Smith* or to any person or persons; and when I look to the parts of his answer to which he refers, I find it relates to other persons altogether, and makes no allusion to *Smith*.

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That being so, I think his answer is clearly insufficient, and the exceptions must be allowed.

If the Defendants wish for their costs, their counsel must ask for them. The rule is otherwise in the case of exceptions to the Master's report; but where exceptions to an answer are allowed, costs do not follow as of course.

Mr. *James* thereupon asked for and obtained his costs.

EXCEPTIONS allowed, with costs.

Minute of
Order.
—

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BETWEEN

FRANCES ROSALIE VANSITTART, THE
WIFE OF THE DEFENDANT CHARLES
VANSITTART BY A. B., HER NEXT
FRIEND, AND THE SAID A. B. *Plaintiffs.*

AND

CHARLES VANSITTART *Defendant.*

V. C. WOOD.
Jan. 12th &
15th.

FULL COURT
OF APPEAL IN
CHANCERY.

March 10th
& 11th.

*Husband and
Wife—Articles
of Separation
—Divorce Suit
—Children,
Custody and
Education of—
Public Policy
—Specific Per-
formance—De-
murrer—Costs.*

The power of a wife to contract with her husband is not confined to her separate property, but extends to other matters, as to which she can be regarded for the purposes of the contract as a femme sole. Thus, a wife suing her husband for a divorce on the ground of adultery and

cruelty, may contract with him to abandon her suit, and the Court would not refuse specific performance of such a contract upon the mere ground of the absence of a trustee—*Semble.*

But where such a contract contained stipulations for the custody by the wife of children above seven years of age, and special stipulations as to their religious education, and a Bill was filed by the wife for specific performance, a demurrer was allowed—1st, because such stipulations related to matters to which her privilege to be regarded as a femme sole did not extend; 2ndly, because they could not be enforced against her in case she refused to adhere to them; and 3rdly, because it would be contrary to public policy to allow a husband, although guilty of adultery and cruelty, thus to transfer to his wife his rights and duties in reference to his children.

Costs—Principles upon which the Court acts in reference to costs in such cases.

THE bill stated, that, in May, 1845, the Plaintiff, Mrs. Vansittart, intermarried with the Defendant; that there was issue of the marriage four children, viz.—*Sidney Nicholas*, aged ten; *Alice Rosalie*, aged nine; *Clement Arthur*, aged seven; and *Cyril Bexley*, aged five years; that, in 1856, the Plaintiff Mrs. Vansittart discovered, according to the fact, that the Defendant had been guilty of adultery; that he was also in the same year guilty of cruelty towards her; and that in consequence she instituted a suit against him in the Ecclesiastical Court of Arches, for a divorce by reason of such adultery and cruelty on his part; but a negotiation for an arrangement of the suit by a deed of separation between her and her husband was entered into by their respective solicitors on their behalf, in consequence of which the suit stood over by consent in order to effect such arrangement. The bill then stated, that several communications passed between the parties as to the terms of the proposed deed; and that eventually, on the

11th of March, 1857, a meeting took place between the Defendant and Mr. *Austin*, Mrs. *Vansittart's* solicitor, at which the Defendant signed the following memorandum of agreement, which was afterwards signed by Mrs. *Vansittart*:—

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"*Re Vansittart and Vansittart*.—Instructions for deed of separation and covenants. Trustee—*A. B.*, of the *Middle Temple*, esquire, Barrister at law, trustee on behalf of Mrs. *Vansittart*. The deed to contain all usual and necessary covenants, clauses, and agreements; to protect Mrs. *Vansittart* from molestation, &c.; to receive her present separate income under the marriage settlement, or otherwise, stated at 180*l.* per annum. Mr. *Vansittart* to allow her the further annual sum of 120*l.*, payable half yearly, to make up her present income to 300*l.* per annum, to be payable out of the income receivable by Mr. *Vansittart* under the marriage settlement. Mr. *Vansittart*, upon due payment of separate income, [to be] (a) secured by trustee's covenant from debts of Mrs. *Vansittart*. The children—Mrs. *Vansittart* to have the custody of two of the children, viz. the daughter (after she is removed from school at Midsummer), and one of the sons, viz. *Cyril Bexley*. And in the meantime, *Sidney* to be given into her charge for half the intervening time, viz. the first ten weeks *Sidney* to be with Mr. *Vansittart* and the remaining period with Mrs. *Vansittart*, and *Arthur* also, if Mr. *Vansittart* does not object; and *Alice* to spend the Easter holidays with Mrs. *Vansittart*; Mr. *Vansittart* to have the custody of the other two sons, viz. *Sidney Nicholas* and *Clement Arthur*, should he desire it, on the daughter joining her mother. In the event of the death of either *Alice Rosalie* or *Cyril Bexley*, or both, Mr. *Vansittart* to be at liberty to place either one or both of the surviving children in their stead under her charge, but no reduction to be made in the allowance to

(a) The Court read the document as if these words had been inserted.

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Mrs. *Vansittart*. The children—Not to be sent to any school in *Berkshire*, or at a less sum than 60*l.* a-year for each child. That neither *Sidney* nor *Arthur* be sent to any school without the written consent of both Mr. and Mrs. *Vansittart*, except the public schools at *Harrow*, *Eton*, *Westminster*, or *Winchester*, the Naval Academies, or *Oxford* or *Cambridge* University when they shall have arrived at sufficient age; those in the custody of Mrs. *Vansittart* to be instructed in the doctrines of the Church of *England*, and those above seven years of age to attend its worship and to be taught the catechism as in the Book of Common Prayer; and should a resident governess or tutor be engaged, the same to be a Protestant. In case of illness of either of the children in Mr. *Vansittart's* charge, Mrs. *Vansittart* to have the care of such during the period of their illness, with a proper allowance. The holidays and half holidays of the children who may be at school to be equally divided between the two parents. If inconvenient to either parent to receive them at such times, they may remain during the whole of the holidays with the other parent. Both parents to have equal liberty to visit and to correspond with them while at school at all convenient times. Any of the sons who may be with Mrs. *Vansittart* to be allowed to visit Mr. *Vansittart* for any space or spaces of time mutually convenient, not exceeding two months in a year; and the daughter in like manner not exceeding one month in a year; and in like manner those who may be with Mr. *Vansittart*. That a further sum of 40*l.* per annum be paid to Mrs. *Vansittart* for board and education of each child beyond the two which may remain with her, but no allowance to be made for occasional or holiday visits as above. That the allowance of 120*l.* per annum commence from the 1st day of this present month of *March*, Mr. *Vansittart* paying her bills and other outgoings up to that day not exceeding 30*l.*, besides 20*l.* due to her for furniture, as soon as the recent sale at *White Waltham* shall

be completed. That the policy on the life of Mr. *Vansittart* for 1200*l.*, now in the possession of Mrs. *Vansittart*, shall be assigned over by Mr. *Vansittart* to her trustee for her sole and separate benefit. That the plate and linen be equally divided. That the deed assigning over to trustees the sum of 4000*l.* to be [*sic*] produced for Mr. *Austin's* inspection and assurance. That the deed of separation be approved by Dr. *Addams* on behalf of both parties; and any dispute which may arise thereon, or in the settlement thereof, be referred to and decided by him; and which deed is to be executed by all parties forthwith. That all the law charges be paid by Mr. *Vansittart*. Should Mr. *Vansittart's* income be augmented by a presentation or otherwise, one-third of such increase to be paid to Mrs. *Vansittart*; and, vice versâ, should Mrs. *Vansittart's* income be increased from any other source except under the wills of her father and mother, in which case Mrs. *Vansittart* to invest one-third of such additional income for the benefit of her children. That should Mr. or Mrs. *Vansittart* at any time take the children abroad, they should give written notice of such their intention to each other previous to doing so. We hereby agree to the above."

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This memorandum having been signed by both Mr. and Mrs. *Vansittart*, it appeared from the statements in the bill that a correspondence ensued between the Defendant's solicitor, a Mr. *Long*, and Mr. *Austin*, in which the former complained that his client had been induced to sign the memorandum of agreement in the absence of his legal adviser: to which *Austin* replied, that it was the Defendant's own wish to sign the memorandum; that he fully understood it, and that there was no complaint to be made on that ground; and the bill averred that this reply was according to the truth. The correspondence, however, continued, *Austin* insisting that the agreement was binding, *Long* making other propositions, but stating that he did not

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recognise the agreement, until the 24th of June, 1857, when *Long* wrote to *Austin* a letter distinctly and definitively objecting on the part of Mr. *Vansittart* to perform the agreement.

The bill contained also the following statements, but without specifying dates, viz. that *Austin* caused a draft deed of separation and covenants to be prepared in accordance with the terms of the memorandum of agreement of the 11th of March ; that, in pursuance of the memorandum of agreement, this draft deed was laid before Dr. *Addams* for his approval, for both parties, and was accordingly perused and approved of by him ; that *Austin* caused the deed to be engrossed in two parts from the draft so perused and approved of by Dr. *Addams*. The bill stated that the deed so engrossed bore date the 9th of May, 1857, and was made between the Defendant of the first part, the Plaintiff *Frances Rosalie Vansittart* of the second part, and the Plaintiff *A. B.* of the third part, and was in strict accordance with the terms of the memorandum of agreement. The bill stated that both the Plaintiffs executed one part of this deed ; but the bill did not state when it was executed by the Plaintiff *A. B.* ; and upon the statements in the bill the Court inferred, that the execution of the deed by that Plaintiff did not take place until after the letter of the 24th of June.

The bill prayed specific performance of the agreement of the 11th of March, 1857, and that the Defendant might be decreed to execute the deed of separation and covenants.

The Defendant demurred for want of equity.

Argument.
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Mr. *Cairns*, Q. C., and Mr. *Dart*, in support of the demurrer, contended, that the contract comprised in the

memorandum of agreement was one which this Court would not enforce :—

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1st. As being made by a wife with her husband : for it was a settled rule both at law and in equity, and a rule founded on public policy, that a wife is incapable of entering into any contract with her husband, except in relation to her separate estate ; and this argument was not affected by the circumstance that the wife had procured a trustee to execute the subsequent deed. The trustee was no party to the agreement, and although he had signed the deed he had not done so until the agreement was repudiated on the part of the Defendant.

2nd. As containing stipulations which (even admitting the wife's capacity to contract with her husband) could never be enforced by this Court, *e. g.* the stipulation that the wife should procure a trustee to indemnify her husband against her debts ; the stipulations as to the custody and education of the children, and the religious opinions in which they were to be brought up ; and the stipulation that the husband should hand over to his wife the income of any subsequent benefice which he might acquire. Of these, the first and second could not be enforced against the wife, the second and third could not be enforced against the husband ; and, as regarded the children, it was contrary to public policy to allow a husband to enter into a contract stipulating for the abandonment of his parental duties.

Mr. *Rolt*, Q. C., and Mr. *Bilton*, in support of the bill :—

As regards the objection that a wife is incapable of contracting with her husband, the rule has always been subject to this exception, that she can so contract in respect of her separate estate ; and the principle of that exception must extend not merely to property, but to all benefits and pri-

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vileges which she can lawfully seek from her husband. Living amicably with her husband, a wife has nothing which can form the subject of contract with him except her separate estate; but adultery and cruelty on his part entitle her to a divorce: and where, as here, a wife has instituted a suit for a divorce, her right to prosecute those proceedings, like her right to her separate property, is one which she can contract with her husband to waive upon any legal terms.

Then as regards the objection to particular stipulations in this agreement, the stipulation as to a trustee has been already performed on the wife's part; and as regards the children it cannot be contrary to public policy that a father, who upon the averments of this bill must be taken, on demurrer, to be open to conviction of adultery and cruelty, should surrender the management and education of his children to the care of their mother. To such a case the decision in *Hope v. Hope*, where the mother was the adulteress, can have no application.

[As to the validity of an agreement by a wife to abandon her proceedings for a divorce, they referred to the authorities collected in *Wilson v. Wilson* (a)].

Mr. Dart in reply—In *Wilson v. Wilson*, there was independent ground for supporting the agreement; here, there is no stipulation on the part of the Plaintiff to abandon her proceedings for a divorce.

The VICE-CHANCELLOR.—So I observe. But the question is, whether such a stipulation must not necessarily be implied?

Mr. Dart.—But how could it be enforced? Could we restrain her if we filed a bill? The Court could make no

(a) 1 H. L. C. 558.

decree against her personally. To enforce it by committing the husband would be absurd : *Emery v. Wase* (a), and the Court could not commit the wife.

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The VICE-CHANCELLOR.—Her suit in the Ecclesiastical Court could easily be stopped, I apprehend, by committing the proctor.

Mr. Dart.—Then she might proceed in person.

But admitting that the Plaintiff was competent to contract with her husband, this contract is bad upon the grounds already urged—first, for want of mutuality ; secondly, upon grounds of public policy.

Judgment reserved.

The following cases were referred to in the course of the argument : *Legard v. Johnson* (b), *Elworthy v. Bird* (c), *Warrender v. Warrender* (d), *Hope v. Hope* (e), *Lord St. John v. Lady St. John* (f), *Worrall v. Jacob* (g), *Wilson v. Wilson* (h), *Earl of Westmeath v. Countess of Westmeath* (i), *Freeman v. More* (k), and *Guth v. Guth* (l).

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating the case made by the bill) now gave judgment as follows :—

Jan. 15th.
Judgment.

The objections raised in the course of the argument to the agreement, of which this bill seeks specific performance, were two : First, it was said to be an agreement between

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| (a) 8 Ves. 516. | (g) 3 Mer. 256. |
| (b) 3 Id. 352. | (h) 14 Sim. 405 ; S.C. on appeal, |
| (c) 2 Sim. & St. 372. | 1 H. L. C. 538, 558. |
| (d) 2 Cl. & Fin. 488. | (i) Jacob, 126 ; S. C. 1 Dow & Cl. |
| (e) 22 Beav. 351 ; S. C. on ap- 544. | |
| peal 3 Jur., N. S., 454. | (k) 1 Br. P. C. ed. Toml. 237. |
| (f) 11 Ves. 532. | (l) 3 Bro. C. C. 614. |

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a husband and wife; and such an agreement, it was argued, is one of which it would be contrary to the first principles of this Court to decree specific performance, it being a settled rule, and a rule established on the ground of public policy, that a wife is incapable of contracting with her husband. That, of course, was an objection to the agreement in toto. Secondly, it was argued, that the agreement contained stipulations on the part of the husband with reference to his children which this Court would not enforce, it being contrary to public policy for a husband to contract, as the Defendant in this case has done, to part with the custody of his children.

It was mainly in reference to the first of these objections, and in consequence of the broad manner in which it was argued, that a contract between husband and wife is contrary to public policy, that I was desirous to look at the authorities.

As a general rule, it is, as every one knows, a well-settled doctrine both at law and in equity, that there can be no contract between husband and wife; but this Court recognises one well-known exception to that rule. It is settled, that a wife can contract with her husband in respect of her separate estate. And I apprehend that the exception does not stop there; but under any circumstances, when the wife is put in such a position that she can be regarded, for the purposes of the contract, as a feme sole, the general rule ceases to have this direct application. It is true, as was said by Lord Justice *Turner*, in *Hope v. Hope* (a), that the case of *Wilson v. Wilson* (b) has not sanctioned any different view of the law with regard to the incapacity of a wife to contract with her husband, inasmuch as in that case there was a contract with a trustee; so that the decision

(a) 3 Jur., N. S., 454.

(b) 1 H. L. C. 538.

could have no bearing upon the particular point discussed in *Hope v. Hope*. But it appears to me, that in reference to any matter as to which a wife is placed in the position of a feme sole, and not merely in reference to her separate estate, she may be also in a position to enter into a contract with her husband.

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Consequently, I could not properly decide this case upon the simple ground that the contract now in question was one between a husband and wife.

The case of a wife being entitled to a divorce as against her husband, actually suing for that divorce, and then entering into an agreement with her husband for the compromise of that suit, is just one of those cases, as it appears to me,—and I think there is very strong authority upon that part of the case—in which the wife is to be considered as a feme sole, capable of contracting with her husband for the abandonment of her suit against him upon any terms for which she may think fit to stipulate; but subject, of course, to this limitation, that her capacity to contract is confined to the matters as to which she is to be considered a feme sole, and to the purposes for which she is to be so considered.

The authority to which I would refer for that proposition is the case of *Bateman v. The Countess of Ross* (a), which was discussed in the House of Lords,—a case very similar to this, and of which the authority is all the greater from the circumstance that the affirmation of the contract, which was then in question, was moved by Lord *Redesdale* and assented to by Lord *Eldon*, which, as Lord *Cottenham* observes in *Wilson v. Wilson* (b), considerably diminishes the force of Lord *Eldon's* observations in *St. John v. St. John*.

(a) 1 Dow, 235.

(b) 1 H. L. C. 573.

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The case of *Bateman v. The Countess of Ross* arose in this way: differences having arisen between *Lady Ross* and her husband, the Respondent in 1780 instituted a suit for divorce and alimony in the Spiritual Court, and in 1781, by her next friend, filed a bill in Chancery against the Appellant, stating that he had neglected to pay the incumbrances on the estate and the Respondent's pin money; and praying, among other things, for an account and payment of the arrears of her annuity, and for a separate maintenance. The Appellant, by his answer, alleged that he had been induced to give her so large an annuity by false representations as to the income from her estates; and in June, 1782, filed a cross bill, praying an account of various articles of value stated to have been taken from him by the Respondent, who had left his house; to which the Respondent answered, that she had a right to the articles in question. Then the parties consented to a reference of all matters in dispute. It is a little unfortunate that the agreement is not set out; whether it was done in open Court by counsel or by specific agreement, does not distinctly appear. They consented to arbitration, and the arbitrators made their award, and the question was, whether that award should stand. Lord *Redesdale* states what the objection was; he said, "It had been objected to the award that the Countess could not agree to the submission so as to bind herself, unless she had been separated from her husband; and her next friend was not made a party to it. But it appeared to him that there was nothing in this objection, as the award was founded on an agreement on both sides, and he had filed a cross-bill against her, which she had answered; so that, under the circumstances of the case, she was to be regarded quite as a feme sole, and there was no occasion to make the next friend a party, as there was nothing for him to consent to. He must act entirely as the wife directed. It was not like

the case of an infant suing by a next friend. The award was confirmed by order upon consent."

Lord *Redesdale*, therefore, treats that case as one in which the wife, being in litigation and at arm's length with her husband, was to be treated in respect of that suit, and of the settlement of that suit, as a feme sole.

And it seems to me, that, so far from this being contrary to public policy, it would be contrary to public policy to hold otherwise. To hold that a wife, litigating with her husband in the Ecclesiastical Court, and suing him for a divorce, is incapable of contracting with him for a compromise of her suit, unless she procures the assistance of some person capable of entering into covenants on her behalf, and induces that person to enter into the requisite covenants with her husband, would be to throw obstacles in the way of the settlement of such disputes, which could hardly be considered for the interest of public policy.

Therefore, if this were the simple case of an agreement between a husband and wife, by which, in consideration of the wife abandoning a suit instituted, as this has been, for a divorce, the husband agreed to pay her an additional annuity, as stipulated in this agreement, and if that were the sole matter in the agreement, I should have a strong impression that the agreement could be enforced, in the same manner as the agreement in *Bateman v. The Countess of Ross*.

But if the agreement contains other stipulations to be performed by the wife, and if those stipulations are such that this Court could not enforce them against the wife, a difficulty arises. The principle upon which an exception is allowed where the wife contracts as a feme sole, does not extend so as to enable her to contract as to any act to be done on her part

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beyond what the necessity of the case requires. The necessity of the case requires that she should be considered as a feme sole for the purpose of abandoning her suit in the Ecclesiastical Court, and obtaining such consideration in return as she may be able. But a difficulty of course arises as to any further stipulations on her part.

Now, in this agreement, I find stipulations on the part of the wife which unquestionably could never be enforced against her. First, there is the stipulation that a trustee is to be found by the wife, who shall indemnify the husband against her debts. Secondly, there are the stipulations with regard to the children, which are objectionable upon two distinct grounds, both fatal to the agreement: the one being, that I could never enforce them against the wife, even if it were right, and public policy would allow me to enforce them against the husband; the other, that I should feel a serious objection, on the ground of public policy, to compel performance on his part of any of those stipulations with regard to his children.

As regards the first stipulation,—that the wife shall provide a trustee, it was argued that this was, in fact, performed by the wife before the agreement was broken off by the husband, the wife having provided a trustee and procured his execution of the deed. But on the statements contained in the bill, I must assume the contrary to have been the case; for the letter of the 24th of June, in which the agreement was broken off, was written before the consent of the trustee was procured; and when that consent was procured the husband had repudiated the contract.

But as that objection might be met by amendment, and amendment would only lead to further, and, as it appears to me, hopeless litigation in respect of this agreement, I proceed to consider the stipulations in reference to the

children. Some of these are very singular. The wife is to have the children above seven years of age, a right which she could not have acquired by any result of her suit for a divorce; and there are very special stipulations, entered into—I must assume, for sufficient reasons,—as to the education of the children, and as to their using the Book of Common Prayer, and being instructed in the Church catechism; and there is also a special stipulation that their governess shall be a Protestant.—How could I enforce such stipulations as these against the wife, if she refused to adhere to them? This Court has no means which it could bring to bear for the purpose of carrying the agreement into effect as regards the children. They are not wards of Court; and even if a bill were filed for the purpose of making them wards of Court (assuming them to have property which could give the Court jurisdiction for that purpose), I could not compel the performance of a contract like the present. And independently of that obstacle, stipulations like these relate to matters to which the privilege of the wife to contract as a feme sole can hardly be extended; that privilege being limited to the benefits which she can obtain in consideration of her abandoning her suit for a divorce, and not extending to other benefits to be acquired in consideration of covenants, agreements, and arrangements on her part, which she may be incapable of performing, or which, at all events, this Court is incapable of compelling her to perform.

Further than that, the husband appears, by the memorandum of agreement, to consider that his children are a burthen to him, and that it is rather for his benefit that they are to be handed over to the wife. There is an express stipulation, that if one of the children in the wife's custody dies, the husband is to be at liberty to place another under her care. Apart from all considerations of public policy, and assuming this stipulation to be one for which

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the husband had a right to bargain, how could this Court compel the wife, in the event of the death of a child in her custody, to take another and support it? But, in fact, the stipulation is not one for which the husband had a right to bargain. Upon grounds of public policy, the case in this respect is open to the same objections as that of *Hope v. Hope*;—in a less aggravated form it is true, for the circumstances of that case are such as to render it singular that it should have been argued once, and much more singular that it should have been argued a second time, before any Court, a more hopeless contract being difficult to be conceived. Here the husband yields up the children above seven years of age to the sole custody of the wife, and enters into stipulations (which, as I have said before, this Court cannot assist him in enforcing) as to the management, education, and religious principles of his children, all of which he ought to superintend himself; bartering away, as it were, to his wife, rights and privileges to which she would never be entitled as the natural result of her suit for a divorce.

Under these circumstances it appears to me, that although the validity of the consideration for this agreement,—namely, the wife's waiving her right to a divorce,—is established by numerous authorities; and although the right of the wife to contract with her husband to waive that right and abandon her suit in the Ecclesiastical Court is sanctioned, as it seems to me, by the House of Lords in *Bateman v. The Countess of Ross*; yet, inasmuch as the agreement contains other stipulations on the part of the wife which this Court cannot compel her to perform, and stipulations on the part of the husband which this Court ought not to allow him to enter into, the bill does not make out a case for a decree, and the demurrer must be allowed.

As to costs, I think a case between husband and wife is not a case for costs.

Mr. *Cairns*, Q. C., submitted that the averments of the bill were only admitted for the purpose of arguing the demurrer, and the Defendant by taking a different course might have suffered in costs at a subsequent stage.

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The VICE-CHANCELLOR.—That had not escaped my attention. I have a strong feeling upon the propriety of demurring under such circumstances, and I have more than once expressed it here. I should be sorry to encourage persons to protract litigation, when there is a neat point which may be argued and decided upon the facts as stated, or upon the effect of legal documents; I should feel that I was driving them to take that course if I allowed an opinion to prevail that a Defendant might suffer in costs in consequence of any admissions necessary for the purpose of his demurrer. But here, all that I assume against the Defendant is, that this memorandum of agreement was signed by him, which showed a desire on his part to come to an arrangement. Arrangements under such circumstances should be encouraged; and I think a case between husband and wife is not a case for costs.

Mr. *Rolt*, Q. C.—The usual course is to insert in the order, "Leave to amend refused." I ask leave to amend; but if that is refused I hope these words will be inserted.

The VICE-CHANCELLOR.—I refuse leave to amend; but it is not usual to insert the proposed words in the order.

DEMURRER allowed—no costs.

*Minute of
Order.*

An appeal from this order was dismissed with costs, by the Lord Chancellor (Lord *Chelmsford*) and the Lords Justices.

*March 10th
& 11th.
Appeal.*

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IN RE WALTON (*A Solicitor.*)

Jan. 19th.

Attorney and Client—6 & 7 Vict. c. 73, ss. 37, 43—*Assignee in Bankruptcy*—*Delivery by, of Bill of Costs*—*Town Agent*—*Papers in Hands of*—*Title of Petition.*

Summary order upon a petition under the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37) against assignees in bankruptcy of a country solicitor, who had employed a London agent, to deliver their bills of costs; and against agent to deliver his bill of costs and petitioner's papers in his possession.

Such petitions should be intituled in the matter of both solicitors; but a petition in the matter of a solicitor need not be intituled in the matter of the Act.

THE petitioner had employed a country solicitor to institute certain proceedings against a railway company which had taken his lands. The solicitor had employed a London agent to conduct these proceedings, and the latter had obtained certain orders for costs against the railway company.

In the meantime the solicitor became bankrupt, and absconded.

The petitioner upon this proposed to the agent to allow him to work out the orders against the company, as his solicitor, and to pay him for so doing; and requiring him, in case he declined, to deliver up the orders; giving him notice at the same time that nothing was due to the country solicitor.

The London agent declined either to deliver up the orders, or to work them out against the company.

The petition prayed that the bills of costs of the solicitor and of the agent, and the orders, should be delivered to the petitioner.

Mr. *Shapter*, Q. C., for the petitioner, cited *Ward v. Hepple* (a).

Mr. *J. Hinde Palmer*, for the assignees, contended that the Court had no jurisdiction to make an order against them except upon bill filed. The Court had summary jurisdiction against a solicitor, because a solicitor is an

(a) 15 Ves. 297.

officer of the Court. But the assignees in bankruptcy of a solicitor were no officers of the Court, and over them the Court had no summary jurisdiction. To such a case the Act 6 & 7 Vict. c. 73 did not apply. That Act referred throughout to a case where the bill of costs had been delivered. Here no bill had been delivered.

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Argument.

This application, moreover, was unreasonable; for the assignees did not claim any bill of costs from the petitioner, all they sought was to be left alone. And as to the orders, the bankrupt had handed them over to the London agent, and there were no longer any papers in his possession, or in that of his assignees, belonging to the petitioner.

The petition also was wrongly intitled. It should have been intitled—In the matter of the Act 6 & 7 Vict. c. 73.

Mr. *Shapter*, Q. C., in reply, referred to the 43rd section of the Act, to show that the petition was properly intitled. And upon the question as to jurisdiction, he referred to the 37th section, which empowers “the Courts and Judges, in the same cases in which they are authorised to refer a bill which has been so delivered as in the Act mentioned, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, *or assignee* of any attorney or solicitor, of such bill as aforesaid; and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as had theretofore been done as regards such attorney or solicitor by such Courts or Judges respectively.”

VICE-CHANCELLOR SIR W. PAGE WOOD :—

That is quite conclusive upon the question of jurisdiction. And as to the orders not being in the bankrupt's

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possession, they were handed by him to his town agent, and are still in the possession of the agent; and the possession of the agent is the possession of the assignees. Having regard to what has passed between the petitioner and the agent in reference to these orders, the latter must deliver them immediately, and without waiting for payment of his bill of costs.

The petition should be headed in the matter of the agent as well as of the country solicitor. In other respects it is properly intitled.

Minute of
 Order.

ORDER the assignees of the bankrupt solicitor to deliver, within three weeks, their bills of costs to the petitioner; and if anything shall be found to be due to them from the petitioner, then order the agent to deliver to the petitioner his bill of costs against the solicitor; and if anything shall be found due to him, order the petitioner to pay to the agent what shall be so found to be due, or so much thereof as the petitioner would otherwise have to pay to the assignees. The orders obtained by the agent against the railway company to be delivered over to the petitioner immediately.—Costs reserved.

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BERRY v. HEBBLETHWAITE.

Creditors' Suit
 — Mortgage —
 Sale—Costs.

THIS was a petition in a creditors' suit, in which the common administration decree had been made.

Where lands subject to a mortgage, had been sold under a decree in a creditors' suit, the mortgagee joining in a convey-

Under the decree, lands of the testator, which were subject to a mortgage debt, had been sold, the mortgagee joining in the conveyance of the premises freed from his mortgage debt.

ance of the lands freed from his mortgage:—*Held*, that he was entitled to have the expenses of the actual sale, but no more, borne out of the proceeds of the sale, the other costs and expenses being left to be defrayed out of the general assets.

Mr. *Amphlett*, Q. C., for the petitioner (the Plaintiff in the suit), contended, that all costs connected with the sale should be defrayed out of the general assets, or at any rate all such costs except the costs and expenses of the auction and the other expenses (if any) of the actual sale.

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Argument.

Mr. *Prendergast*, for the mortgagee, contended, that he was entitled to have all his costs connected with the sale, and not merely those of the actual sale, defrayed out of the proceeds of the sale.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

All that the mortgagee is entitled to have paid out of the proceeds of the sale in respect of costs is the simple expenses of the actual sale. All other costs and expenses connected with the sale will be left to be defrayed out of the general assets, but the expenses of the actual sale I shall order to be paid out of the proceeds of the sale.

Judgment.

IN RE THE BRISTOL & EXETER RAILWAY ACT,
6 & 7 WILL IV. c. XXXVI.,

AND

IN RE LAND'S TRUST.

Jan. 19th.

THIS was a petition for a transfer into the name of the Petitioner, of a sum of stock representing the purchase money of lands which had been taken by the *Bristol and Exeter* Railway Company for the purposes of the railway during the Petitioner's minority; and praying also for pay-

Railway Com-
pany—Pur-
chase or Com-
pensation Mo-
ney Transfer
of Stock to Per-
son absolutely
entitled—Costs.

Where purchase money had been paid into Court by the *Bristol and Exeter* Railway Company and invested in stock—*Held*, on the construction of the Company's Act, that the Court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, notwithstanding they might have been ordered under the Act to pay much larger costs, had the petition prayed a reinvestment in land.

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ment to the Petitioner of a dividend which had accrued due in respect of the stock since he came of age (a).

By an order made in the same matter during the Petitioner's minority, the dividends had been ordered to be paid to his guardian during his minority or until further order.

The Petitioner was entitled absolutely to the stock mentioned in the petition.

(a) By the Company's Act (6 Will. 4, c. xxxvi. s. 39) after making provision for the payment into the Bank of England of compensation money for lands belonging to corporations and certain persons under disabilities, it was enacted, That the money when paid in should there remain until the same should, by order of the Court made in a summary way upon petition to be presented to the said Court by the party who would have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith to the same or the like uses, trusts, intents, or purposes, as the Court should authorise to be purchased or paid, or such part thereof as should be necessary, or until the same should, upon the like application, be laid out by order of the Court made in a summary way as aforesaid, in the purchase of other lands which should be conveyed, limited, and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the

lands which should be so purchased, taken, or used, as aforesaid, or in respect of which such compensation or satisfaction should be paid, stood settled or limited, or such of them as at the time of making such conveyance and settlement should be existing, undetermined, or capable of taking effect. Provision was then made for investment of the money and for payment of the dividends in the meantime, and until such purchase could be made.

By s. 44 it was provided, that, where by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any satisfaction, recompense, or compensation should be payable under the authority of the Act, the purchase money for the same, or the money paid for such compensation should be required to be paid into the Bank of England for the purpose of being invested in the purchase of Consolidated or Reduced Bank Annuities, or in other Government securities, to be applied in the purchase of other lands to be settled to the like uses in pursuance of the Act, it should be lawful for the Court to order all the costs, charges, and

The company did not object to transfer the stock, but they objected to pay the costs.

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Argument.

Mr. *Karslake*, for the Petitioner, contended, that the Court had power under the Company's Act to order the company to pay the costs, citing *Ex parte Marshall in re The Great Western Railway Acts* (a). "When the Act directs the payment of the money into court, it clearly contemplates the payment of it out of court; and this construction is consistent with the meaning of the Act and the justice of the case. When a public company takes land for their own purposes, it is right they should pay all costs incident on such taking:" per Lord *Lyndhurst*, C. (b).

When the application is for an investment, or a re-investment of purchase or compensation money in land, the Court has power under the Act to order all costs, charges, and expenses to be borne by the company. And if the prayer of this petition had been, that the stock in question might be sold out and invested in land, the costs, which would have far exceeded those now asked for by the Petitioner, would have been ordered to be paid by the company as a matter of course: per Vice-Chancellor *Knight*

expenses of, or which might be incurred in consequence of, the purchase or taking or using of such lands by the company under and by virtue of the Act, and also of the investment of the purchase and compensation money in Consolidated or Reduced Bank Annuities, or other Government securities, or of the reinvestment of such purchase and compensation money in land, together with the necessary costs and charges of obtaining the

proper order for such purposes, and for the payment of the dividends, to be paid by the said company out of the moneys to be received by virtue of the Act; and the said company should from time to time pay such sums of money for such costs, charges, and expenses, as the Court should direct.

(a) 4 Railw. Cas. 58; S. C., 1 Phill. 560.

(b) 4 Railw. Cas. 61.

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Bruce, in *Ex parte Marshall* (a). Here, therefore, the argument was à fortiori.

The argument, that a case like the present, where the Petitioner is absolutely entitled and asks for an absolute transfer and not a re-investment of the fund, is not provided for by the 44th section of the Act, went too far, for neither is such a case provided for by the 39th section. If, therefore, the Act were to be thus strictly construed, the Court would have no power to order payment out of court to any person absolutely entitled.

At all events, the Petitioner was entitled to the costs of this petition so far as it sought payment of the dividend now due, for as to that the Act was express.

Mr. *Osborne*, for the company, objected to pay any costs whatever.

In *Ex parte Marshall*, the language of the Act was in effect the same as in the Lands Clauses Act, providing expressly for the costs "of the payment of the principal or compensation money and of the Government and real securities purchased therewith out of court," and enabling the Court to order such costs to be paid by the company. Here the words of the Act were different, and the interpretation to be put upon them had been expressly decided in favour of the company in a similar application: *In re The Bristol and Exeter Railway Company*, *Ex parte Gore Langton* (b), where *Ex parte Marshall* was cited; but the Vice-Chancellor of *England* held, that the language of the two Acts was different, and that in this Act the words relating to the purchase of lands could not fairly be applied to the case of payment out of court. A like decision had been come to by Lord Justice *Knight Bruce*, when Vice-Chan-

(a) 4 Railw. Cas. 60.

(b) 11 Jur. 686.

cellor, in *Ex parte Thoroton, in re The Midland Counties Railway Company* (a), where the words of the Act were as here. His Honour said, "In reason, justice, and propriety, the company ought to pay the costs; and he would give them if he could. He thought, however, that he could not; and he had so decided in *Ex parte Molyneux, in re The Liverpool and Manchester Railway Act*" (b).

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Argument.

The VICE-CHANCELLOR.—I quite concur in all that the Vice-Chancellor there says as to the excessively ungracious character of a refusal like this on the part of the company, when they might confessedly have been compelled to pay such far larger costs, had the petition been for a re-investment in land. But what do you say as to the dividend?

Mr. Osborne.—The petitioner could have obtained that under the former order.

The VICE-CHANCELLOR.—That order is confined to dividends accruing due during his minority.

Mr. Osborne.—But here he applies for both purposes—a transfer of the fund as well as payment of the dividend; and no order should be made at all as to costs.

The VICE-CHANCELLOR.—There may be some extra costs incidental to the transfer of the fund; and if the petitioner insists on those I must hear his counsel in reply. But as to the dividend, he was obliged to come here for payment of that; the costs of that part of his application I have clearly the power to make the company pay, and I shall certainly order them to do so.

As to the rest, it appears to me at present that I am

(a) 17 Law J., N. S., Ch., 167.

(b) 2 Coll. 273.

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Argument.

bound by the cases that have been cited, especially that before Vice-Chancellor *Knight Bruce* (a), though I say so with extreme reluctance.

Mr. *Karslake* said he was precluded, by the decision in *Ex parte Gore Langton* (b), from replying as to extra costs (if any). He would, therefore, take the order as proposed by the Court.

Judgment.

The VICE-CHANCELLOR said, that, upon the construction of the Act, it would have been useless to ask for more. The point had been often before the Court in unreported cases upon this or similar Acts passed before the Lands Clauses Act; but the Court had held, however reluctantly, that words like those in the present Act did not enable it to make the Company bear the costs of an absolute transfer.

Minute of
Order.

ORDER payment of the dividend and transfer of stock as prayed. The costs, so far as they relate to the dividend, to be paid by the company.

The like decision upon a similar Act, in a matter transferred from the Exchequer, notwithstanding *In re Robertson* (23 Beav. 433.)

THE same question arose shortly afterwards (13th March, 1858), upon an unopposed Petition, *In re Mauseley's Trust*, and *In re The Act 6 Will. 4, c. xxxv.*, incorporating the *Birmingham and Derby Junction Railway Company*, transferred from the Court of Exchequer, when Mr. *Traill*, for the Petitioners, cited *In re Robertson* (c) to show that, in matters so transferred, this Court had power under the 5th Vict. c. 5 to adopt the practice of the Court of Exchequer, and would order the costs of an absolute transfer to be paid by the Company.

The VICE-CHANCELLOR took time to consider that authority, and on a subsequent day decided that he was bound by the authorities, and especially *Ex parte Molyneux*, to hold that the Court had not the power to order the Company to pay the costs of an absolute transfer.

(a) *Ex parte Thoroton*, 17 Law J., N. S., Ch., 167.

(b) 11 Jur. 686.

(c) 23 Beav. 433.

1858.

IN THE MATTER OF WILLIAM'S SETTLEMENT,

Jan. 19th.

AND

IN THE MATTER OF THE ACT 10 & 11 VICT. c. 96.

BY an indenture dated 1845, certain sums of money were assigned to one *Williams* upon the trusts therein mentioned.

Trustee Relief Act—10 & 11 Vict. c. 96—Trustee paying Money into Court—Retiring from the Trust—Power to appoint new Trustees.

The deed contained a power for the Petitioner, who was one of the cestuis que trust, to appoint any other fit and proper person to be a trustee jointly with *Williams*. It also contained a further power for the Petitioner, in case *Williams* should die or be desirous to be discharged from, or refuse or decline or become incapable to act in, the trusts thereof, to appoint a new trustee in his place.

A trustee who had paid money into court under the Trustee Relief Act (10 & 11 Vict. c. 96)—held to have retired from his trust, and a new trustee held to have been duly appointed in his stead under a power for that purpose, to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement."

In exercise of the first power, the Petitioner appointed one *Watson* to be a trustee jointly with *Williams*, and called upon *Williams* to invest the trust fund in the joint names of himself and *Watson*.

Williams conceiving that he had good reason to object to act with *Watson* in the trust, declined to invest the money as proposed, and paid it into court under the Trustee Relief Act.

The Petitioner, therefore, proceeded to appoint one *White* to be trustee in the place of *Williams*, and now presented a petition under the Trustee Relief Act, 10 & 11 Vict. c. 96, praying to have the fund paid out of court to *Watson* and *White*.

Mr. *Field*, for the Petitioner, contended that *White* was well appointed, *Williams* having in effect "refused or declined to act in the trusts" of the settlement.

Argument.

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 IN RE WIL-
 LIAMS' SET-
 TLEMENT.
 —
Argument.

Mr. *Drewry*, for the Respondent *Williams*, submitted whether he could be taken to have resigned, merely because he had paid the money into court. *Williams* had no desire to continue a trustee; and, if *White* was not already duly appointed, he might now be appointed by the Court, under the Trustee Act, 1850. But for that purpose the petition should have been intitled "In the matter of the Trustee Act, 1850," and not merely, as here, "In the matter of the Trustee Relief Act."

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Since it is necessary to decide the point, I hold that payment of a trust fund into court is a retiring from the trust; and that the Respondent *Williams*, by paying this fund into court, did in effect retire from the trust; *White*, therefore, has been duly appointed under the power contained in the settlement.

Jan. 20th &
 28th.
*Practice—Pro-
 duction of
 Documents—
 Discovery—Jus
 tertii.*

REYNOLDS v. GODLEE.

THE Plaintiff and the Defendant *Head* had a common interest in contesting the claim of the Defendant *Godlee* to the property in question in the suit; in the event of their succeeding in that contest, a further question would arise between the Plaintiff and *Head*, as to which had the better title.

Upon motion on behalf of a Defendant in a suit, for production by the Plaintiff of a document of which the Plaintiff had obtained production by an order against his Co-defendant, the Court refused to make an order in the absence of the latter.

In support of his case against *Head*, the Plaintiff alleged by his bill, that an opinion of counsel had been taken by a person through whom both claimed; and he moved against *Head* for a production of this document, and obtained an order for its production.

The document having been produced, and the Plaintiff

But the mere circumstance of the Plaintiff having obtained the document for a specific and limited purpose would not have entitled him to have it protected on the ground of an implied confidence that it should not be used for any other purpose—*Semble*.

having taken a copy of it, a motion was now made on behalf of *Godlee*, for an order upon the Plaintiff to produce the copy.

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The Defendant *Head* had not been served with notice of this motion.

Mr. *James*, Q. C., and Mr. *Little*, in support of the motion.

Argument.

The Plaintiff had lawfully got possession of the copy, and that without any understanding as to its not being communicated to others, but as of right and by compulsion. He had stated it in his bill, and made it part of his case ; he had therefore no more right to protect it from production, than he had to withhold any other document on which he relied. Under these circumstances, it was impossible for the Plaintiff to set up the *jus tertii* as an answer to the motion.

Mr. *Cairns*, Q. C., and Mr. *Archibald Smith*, for the Plaintiff, contended, that, having obtained the document by a motion against *Head*, in whose hands it was privileged against the Defendant *Godlee*, the Plaintiff could not be called upon to produce the copy without *Head's* consent. He had obtained it for a particular purpose ; and where a document has been communicated voluntarily—and *à fortiori* where it has been obtained compulsorily by the order of this Court,—for a limited and restricted purpose, it would be unjust and unlawful to allow the original, or a copy of it, which is the same thing, to be communicated in any manner except for that purpose : *Enthoven v. Cobb*(a) ; and upon this principle it was, that, in *Richardson v. Hastings* (b), Lord *Langdale* imposed terms upon the party applying for production. Here the document in question

(a) 5 De G. & Sm. 595 ; S. C., on appeal, 2 De G. M. & Gor. 635.

(b) 7 Beav. 354.

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in effect was *Head's*, and the motion could not be heard in his absence.

It was argued, that the Plaintiff had stated it in his bill ; but he had done so merely as part of his case against *Head* ; it formed no part of his case against *Godlee*, and was not put in issue as between the Plaintiff and that Defendant. The document was simply one as to which the Plaintiff would have a controversy with *Head*, in the event of their both succeeding against *Godlee*.

The VICE-CHANCELLOR, stopping the argument, ordered the motion to stand over, and notice to be served on the Defendant *Head*.

The motion stood over accordingly ; and before it was resumed, the Plaintiff filed an affidavit, stating that the document of which production was sought, was an opinion of counsel taken by a common ancestor of the Plaintiff and the Defendant *Head*, in reference to the matter in question in the suit ; and submitting that the Plaintiff equally with the Defendant *Head* was entitled to have it protected from production.

Jan. 28th.

The hearing of the motion being now resumed,

Mr. *Rolt*, Q. C., and Mr. *Cotton*, for the Defendant *Head*, insisted on his right to have the document protected in the hands of the Plaintiff. They cited *The Attorney-General v. Clapham* (a), *Glover v. Hall* (b), and *Witham v. The Prince of Wales Insurance Company* (c).

Mr. *James*, Q. C., in reply.—In *Enthoven v. Cobb*, there was express confidence between the parties,—an express

(a) 10 Hare, App. lxviii.

(b) 2 Phill. 484.

(c) 23 Law J., N. S., Ch., 340.

understanding that the party who got possession of the document should not publish it.

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REYNOLDS
v.
GODLEE.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It appears to me, now that I have read the Plaintiff's fresh affidavit, that he is entitled in his own right to have this document protected from production.

When the motion was before me on the former occasion, the Plaintiff rested his case not upon his own right to privilege, but only upon that of *Head*; and submitted, that, having obtained the original by a motion against *Head*, he ought not to be called upon to produce the copy without *Head's* consent.

That raised a question of general interest, and of no small importance. It was said, that, *Enthoven v. Cobb* having decided that where a person has obtained documents in confidence, and for a limited and restricted purpose, he cannot be compelled to divulge them except for that purpose, it followed upon principle—and it was even argued that it followed *à fortiori*—that where documents have been produced, not in confidence,—not voluntarily, but upon compulsion and under an order of this Court, the like rule would apply.

It appeared to me that this was not only a novel doctrine, but one which would be attended with very inconvenient consequences. Information obtained in one suit would be protected in another. In a tithe suit, for instance, by a rector, if the Plaintiff obtained evidence which established the existence of a modus, he might be protected in all subsequent suits from producing the evidence by which such modus was established. Such a proposition is certainly

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—
Judgment.

not covered by authority, and I should be sorry to introduce a rule which might lead to so much inconvenience.

If, on the other hand, the rule be this, that, where documents have been produced in obedience to an order of this Court, the Court has a right to say to the person who has obtained their production :—‘ Those documents shall never be used by you except under the authority of the Court,’ the course of proceeding would be intelligible and safe, and no inconvenience would ensue to either party. With such a rule, the course taken by the Court in *Richardson v. Hastings* is perfectly consistent.

So the case stood when the motion first came before me. The Plaintiff did not rely upon his own right to have the document protected from production, but only upon that of *Head*. And as *Head* might have something to say, I thought he ought to be here.

The Plaintiff has now filed an affidavit by which he distinctly relies upon his own right ; and looking to the ground upon which he claims to have that right, I think he is entitled to have the document protected.

The motion therefore will be refused.

1858.

TALBOT v. KEMSHEAD.

Jan. 26th.

BILL to establish an equitable mortgage of lands, which, in 1853, the Defendant *Walker* agreed to mortgage to the Plaintiffs, and for an account and payment of what was due to the Plaintiffs for principal and interest, or, in default, for a sale of the premises.

Practice—Disclaimer—Costs.

Parties properly made Defendants to a suit in the first instance, and afterwards giving notice to Plaintiff that they do not claim any interest, are not entitled to their costs, notwithstanding such notice was given before putting in their answer, unless they have gone on to offer their consent to have the bill dismissed against them without costs up to the date of such notice.

The bill averred that the Defendants *Kemshead, Robins, and Roy* claimed an interest in the premises under an alleged conveyance to them by *Walker*, dated 1855, but charged that the Defendants took with notice of the agreement of 1853.

After the filing of the bill, the Defendants *Kemshead, Robins, and Roy* gave notice to the Plaintiffs' solicitors, that, since the bill was filed, *Walker* had revoked the conveyance of 1855, and that they did not claim any interest in the premises. But they did not go on to offer to have the bill dismissed as against them without costs.

And it rests with Defendants to offer such consent, and not with Plaintiffs to ask it.

All the Defendants having put in their answers, and the cause now coming on to be heard, a question arose, whether the Defendants *Kemshead, Robins, and Roy*, were entitled to have the bill dismissed as against them without costs.

Argument.

Mr. *Karslake*, for the Plaintiffs, submitted that they were not. They had an interest when the bill was filed, and up to that time they had never disclaimed; they were, therefore, properly made parties to the suit; and whether they repudiated that interest by their answer, or by notice before putting in their answer, was immaterial, the sole question

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 —
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being, whether they were properly made parties in the first instance : *Tipping v. Power* (a), *Appleby v. Duke* (b).

Mr. *Rogers*, for the Defendants *Kemshead, Robins*, and *Roy*, contended, that, those Defendants having given notice to the Plaintiffs before putting in their answer, that their interest was determined and that they claimed no interest, the bill should be dismissed as against them without costs, or, at all events, without costs from the date of such notice. That would be a fair and equitable rule—

The VICE-CHANCELLOR.—If you went on to say you were willing to be dismissed without costs up to the date of your notice. But without that, I do not see how the Plaintiffs can dismiss you. They cannot hand in a brief to the registrar without your consent.

Mr. *Rogers*.—Had they asked my consent, I should have given it ; but it lay with them to take the initiative. Having omitted to do so, having brought the cause on to a hearing against parties who, they well knew, had no interest, they should be made to pay the costs of what was equally useless to them and vexatious to the Defendants.

Mr. *Southgate*, for the Defendant *Walker*.

A reply was not heard.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD :

As to the costs of the Defendants *Kemshead, Robins*, and *Roy*, it stands thus on the authorities cited, in which it appears to me that the case of the Defendants was substantially the same as that now before me : where a Defen-

(a) 1 Hare, 405, 408. (b) Id. 303; *S. C.*, on appeal, 1 Phill. 272.

dant merely says by his answer, "I do now disclaim," not "I never did claim," which is the true form of a disclaimer, but, "Now, after bill filed, I disclaim,"—in all such cases, the Court has said, that, if he seeks to have the bill dismissed as against him, he must bear his own costs. And the rule must clearly be the same whether he says that by his answer, as in the cases cited, or as here, by notice given to the Plaintiffs after bill filed, the foundation of the rule being this, that where a person was properly made Defendant to a suit in the first instance, by reason of his having an interest when the bill was filed, there it is not enough for him to say he does not now claim, unless he goes on to say that he is willing to have the bill dismissed against him without costs up to that time. For, how otherwise can the Plaintiff dismiss him without bringing the cause on to a hearing?

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—
Judgment.

Whether, if the question were yet undecided, it might not be reasonable to hold that the Plaintiff ought to ask a Defendant, upon such notice being given, whether he will consent to the bill being so dismissed, is a question which, looking to the authorities that were cited, I am not at liberty to consider. According to those authorities, the Plaintiff is under no such obligation, and I am bound to follow them.

THE Defendants *Kemshead, Robins, and Roy*, further disclaiming at the bar, dismiss the bill against them, without costs.

*Minute of
Order.*

1858.

Jan. 21st &
22nd.

TALBOT (EARL) v. HOPE SCOTT AND OTHERS.

Jurisdiction—
Receiver—In-
junction against
Waste—Bill
for, against
Party in Posses-
sion—Plaintiff claiming under Title at Law—Pending Claim to Peerage—House of Lords—
Committee of Privileges—Jurisdiction of, as to Property.

THE bill, filed by Earl Talbot, claiming to be Earl of Shrewsbury, against Mr. Hope Scott, Mr. Serjeant Bellasis, Lord Edmund Howard, and others, stated, that by an Act of

The authorities as to the jurisdiction of this Court to interfere at the instance of parties claiming real property under a legal title, by appointing a receiver of the rents and profits, and by injunction to restrain waste, examined.

They establish these propositions:—1st, In the absence of fraud, and where there is no privity between the parties, this Court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. 2nd. Nor will it interfere, at the like instance, to restrain waste, except malicious or destructive waste, *e. g.* by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at law. 3rd. But flagrant acts of this exceptional character would at the present day be restrained, and that before judgment at law; and notwithstanding Plaintiff were out of possession, and his title denied on oath by Defendant.

Therefore, where a bill alleged that Plaintiff was Earl of Shrewsbury, and entitled as such to real estates inalienably annexed to the earldom by Act of Parliament, his title as to part, called the settled estates, being legal, and as to the rest, called the unsettled estates, being equitable; that his claim to the earldom had been heard in the House of Lords before a Committee of Privileges, who had already expressed a strong opinion (although they had not actually decided) in his favour; that Defendants, claiming under a will of the late Earl, "by favour of some of the tenants," had entered into receipt of the rents of the settled estates to an amount exceeding 25,000*l.* a-year; and that they had cut down considerable quantities of timber on the estates generally, some of an ornamental character, and some not ripe for cutting; and charged that many of the tenants of the settled estates, by reason of the conflicting claims to the earldom had refused to pay their rents to Plaintiff or Defendants, by reason whereof rents exceeding 5000*l.* a-year were in danger of being lost; and prayed, that, pending Plaintiff's proceedings to establish his claim to the earldom, and his proceedings by ejectment, which he offered to bring when that claim was established, a receiver might be appointed, and the Defendants restrained from cutting timber on the estate; a demurrer was allowed to so much of the bill as sought relief in respect of the settled estates; the Court being of opinion that the amount at stake did not affect the question, that the unpaid rents (5000*l.* per annum) need not be lost, (since, if an action were brought, they would be paid either to Plaintiff or into court upon interpleader), and that the waste alleged was not such as to justify interference.

And to so much of the bill as sought relief in respect of the unsettled estates, a plea that Plaintiff was not Earl of Shrewsbury, was allowed.

Whether, pending his claim in the House of Lords, Plaintiff could not have taken proceedings at law to recover the estates; and whether, if otherwise entitled here to summary relief, he ought not to satisfy the Court that an action is pending between him and Defendants, which will try his right—*Quære*.

Dicta of Sir A. Hart, in *Lloyd v. Lord Trimleston* (2 Moll. 81), as to the effect of possession obtained by favour of the tenants, considered. His remark that such possession has not the quality of an authorised possession, and that a devisee so let into possession does not acquire any right, was meant to apply to some case of fraudulent or forcible possession which the law will not authorise,—not to such a possession as would put the heir to legal process for the recovery of his right.

Parliament, intituled "An Act for annexing the late Duke of *Shrewsbury's* estate to the Earldom of *Shrewsbury*, and confirming *Gilbert* Earl of *Shrewsbury's* settlement in order thereto, and for other purposes therein mentioned," being the Act 6 Geo. 1, c. xxix., certain real estates were limited to the use of *Gilbert* Earl of *Shrewsbury*, *George Talbot*, and *John Talbot* of *Longford*, for life, with remainder to the first and other sons successively of each of them successively in tail male, and for default of such issue to the use of all and every person or persons being issue male of the body of *John* first Earl of *Shrewsbury* (who died A. D. 1453), to whom the title, honour, and dignity of Earl of *Shrewsbury* should, after the decease of the said *Gilbert*, *George*, and *John* of *Longford*, without issue male of their respective bodies, by virtue of the letters patent of the creation of the Earldom, descend and come severally and successively one after another, as they and every of them should succeed to and inherit the said Earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said Earldom, and to be annexed to and descend with the same. This Act contained clauses prohibiting alienation of any of the premises by *Gilbert*, *George*, and *John* of *Longford*, or the heirs male of their bodies, and declaring every such alienation to be void, but with a proviso that such of them as should be and continue Protestants as therein mentioned, should not be disabled while continuing Protestants from alienating the premises.

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The bill further stated, that, by Acts 43 Geo. 3, c. xl., and 6 & 7 Vict. c. xxviii., parts of the estates so settled by the Act 6 Geo. 1, in the counties of *Salop*, *Berks*, *Wilts*, *Oxford*, *Chester*, *Worcester*, and *Stafford*, were vested in trustees, now represented by the Defendants, Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, upon trust, to sell and

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to lay out the moneys to arise by such sale in the purchase of other lands and hereditaments to be settled in lieu thereof to the same uses, and subject to the same restrictions; and that, by the 32nd section of the last of these Acts (6 & 7 Vict. c. xxviii.), the proviso in the Act 6 Geo. 1, in reference to alienation by such of the persons therein mentioned as should be and continue Protestants, was repealed.

The bill stated that divers of the lands authorised by the Acts 43 Geo. 3, and 6 & 7 Vict. to be sold, were sold and conveyed to the purchasers, and other lands were purchased with the moneys arising from such sales, and were conveyed and settled as directed by those Acts.

The bill then averred, that *Gilbert Earl of Shrewsbury*, and *John Talbot of Longford*, both died without issue, in 1743; that *George Talbot* died in 1733, and that all his issue male (twenty persons in number), was now spent; the last of them to whom the Earldom of *Shrewsbury* had descended, *Bertram Arthur*, 17th Earl, having died without issue in August 1856; that the Earldom of *Shrewsbury* was created by letters patent, dated A.D. 1442, in the person of *John Baron Talbot*, to hold the same to him and the heirs male of his body; and that on the death of *Bertram Arthur*, the 17th Earl, the Plaintiff was heir male of *John Baron Talbot*; and the bill then proceeded to trace the Plaintiff's heirship through eighty-six persons, averring all the facts necessary to establish it through every link of the alleged pedigree.

The bill charged that the Plaintiff, as the heir male of *John* first Earl of *Shrewsbury*, was entitled to succeed to the title, dignity, and peerage of Earl of *Shrewsbury*; and then proceeded to state, that, on the 20th of February, 1857, he had presented a petition to her Majesty, praying

that the same might be declared and adjudged to belong to him, and for a writ of summons to Parliament accordingly; that such petition, with the report of the Attorney-General thereon, had been referred to the House of Peers on the 9th of May, 1857; and the House of Peers, on the 11th of May, 1857, had referred the same to a Committee of Privileges to consider and report thereon; that the Committee of Privileges met on the 13th of July, and continued to sit at intervals till the 14th of August, 1857; and in the course of such sitting counsel were heard in support of the Plaintiff's claim, and in opposition thereto, on the part of the Duke of *Norfolk*, acting as guardian to his infant son the Defendant Lord *Edmund Howard*, in whose favour the late Earl of *Shrewsbury* had devised or attempted to devise the estates annexed to the title by the Act 6 Geo. 1, the Defendants Mr. *Hope Scott* and Mr. Serjeant *Bellasis* being the devisees in trust for Lord *Edmund Howard*;—that the Attorney-General appeared on behalf of the Crown, and counsel were also heard on behalf of the Defendants, Princess *Doria Pamphili* and the Duchess of *Sora*, a daughter and granddaughter of *John* late Earl of *Shrewsbury*, against the claim of the Plaintiff; that the counsel who appeared for the Duke of *Norfolk*, as guardian for his infant son, urged as an argument in support of his right to appear in opposition to the Plaintiff's claim to the Earldom, that the decision of the Committee on such claim would also decide the right to the estates annexed to the Earldom by the Act; and the Duke was on that ground allowed to appear by counsel for his infant son in opposition thereto. The bill then contained statements to the effect, that, in the course of the proceedings before the Committee of Privileges, it appeared that there were only three links in the pedigree which it became necessary for the Plaintiff to prove in order to establish his claim; and that, upon two of them, the Lord Chancellor had expressed an opinion in his favour; and that after hearing the Attorney-

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General on the whole case, the committee had adjourned, on the 14th of August, 1857, to consider the evidence : and the case now stood adjourned accordingly.

The bill then charged, that, by virtue of the Acts of Parliament above mentioned, the Plaintiff became, on the death of the late Earl, and was now, entitled as tenant in tail in possession to the settled estates, as inseparably annexed by those Acts to the Earldom, including therein the hereditaments settled by the Act 6 Geo. 1, excepting such hereditaments as by the 43 Geo. 3, and 6 & 7 Vict. were vested in trustees, but including therein all hereditaments purchased pursuant to the two last-mentioned Acts ; and that the Plaintiff was also entitled to the rents, issues, and profits of the hereditaments, which, by the two last-mentioned Acts, were vested in trustees for sale, but which had not been yet sold : but that, in the years 1855 and 1856, the late Earl had executed two deeds purporting to disentail all the property in question, and subsequently by his will had purported to devise the same to the Defendants, Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, for the term of 1000 years, and subject thereto to uses in strict settlement ; under which Lord *Edmund* was first tenant for life, with remainders over ; and the trustees were thereby empowered, during the minority of any person entitled in possession to the premises, to continue in possession of the premises, and in the management thereof, and out of the rents to pay the expenses of management, and provide for the maintenance and education of such minor, and to invest the residue for his benefit.

The bill then stated, that, upon the death of the late Earl, the Plaintiff was abroad, residing in *Italy*, and the Defendants *Hope Scott* and *Bellasis*, by favour of some of the tenants of the settled estates, entered into the receipts of the rents and profits of the greater part of the

settled estates, and they notified to all the tenants of all the settled estates that they were entitled to receive all the rents of all the settled estates; and the Plaintiff by his agent notified to all the tenants that he was entitled to receive all the rents of all the settled estates; but the Plaintiff was not and had not been in possession of any of the rents of the estates or any part thereof, none of the tenants having consented to acknowledge the title of the Plaintiff or to pay him rent; that, by reason of such entry and claim by the last-named Defendants, the Plaintiff had been prevented from receiving the rents of the settled estates; and the same Defendants had received a large portion thereof; and they were in receipt of rents amounting to upwards of 25,000*l.* per annum, and had actually received rents to more than that amount. The annual rent of the settled estates was averred by the bill to amount to 35,000*l.* and upwards.

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The bill also charged, that many of the tenants of divers parts of the settled estates had, by reason of the conflicting claims to the Earldom, refused to pay their rents to either the Plaintiff or the Defendants, and by reason thereof rents to a large amount, and exceeding 5000*l.* per annum, were in jeopardy and in danger of being lost; and that some of the tenants who so refused to pay their rents were very poor.

It also charged, that the same Defendants had cut down considerable quantities of timber on the estates, and that some of it was of an ornamental character, and some of it was not ripe for cutting, and they had sold the same, and received the proceeds thereof; and they threatened and intended to cut more timber growing on the estates, to the great injury and detriment thereof; and they were then cutting down timber growing on part of the settled estates at *Alton*, in the county of *Stafford*.

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The bill concluded with charging, that the late Earl had died during the recess of Parliament, which did not meet till the 3rd of February, 1857, immediately after which the Plaintiff had presented his petition to the Queen ; and, ever since the reference to the Committee of Privileges, the Plaintiff had been diligent in laying before the Committee the evidence of his claim ; and that the Plaintiff was willing to undertake to use all diligence in prosecuting his claim before the Committee, and, on his claim to the Earldom being established, to proceed forthwith by ejectment to recover possession of the settled estates.

The bill prayed, that, pending the Plaintiff's proceedings to establish his claim to the Earldom, and his proceeding by ejectment, some proper person might be appointed to receive the rents and profits accrued due since the decease of the late Earl, or thereafter to accrue due in respect of the estates settled by the Act 6 Geo. 1, and of the estates added or to be added thereto pursuant to the Acts 43 Geo. 3 and 6 & 7 Vict., except such parts as had been sold pursuant to the two last-mentioned Acts ; that the deeds and documents might be secured pending the suit ; that an account might be taken of the rents and profits received by the Defendants *Hope Scott* and *Bellasis*, or either of them ; and that the same might be ordered to be paid into court, to be there secured for the benefit of the Plaintiff or the person or persons who should be found entitled to the same ; that an account might be taken of the timber cut down by the Defendants and of the proceeds thereof ; and that the same might be ordered to be paid into court to be secured for the benefit of the Plaintiff or the person or persons who should be found to be entitled to the same ; and that, pending the proceedings aforesaid, the Defendants might be restrained by injunction from cutting any timber or trees being or growing on the premises, and from committing any waste thereon, and from

receiving any of the rents, and from interfering with any of the tenants of the same hereditaments.

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To so much of the bill as sought relief in respect of the settled estates, the Defendant *Hope Scott* demurred; to the rest of the bill he pleaded that the Plaintiff was not Earl of *Shrewsbury*.

The Defendant *Bellasis* put in a similar plea to the whole of the bill.

Each of these Defendants put in a voluntary answer in support of his plea, traversing such averments in the bill in support of the Plaintiff's pedigree as he believed to be unfounded.

Mr. *James*, Q. C., Mr. *Cairns*, Q. C., and Mr. *C. Hall*, for the Defendants Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, in support of the demurrer and plea:—

Argument.

As regards the settled estates, the demurrers must be allowed. The Plaintiff claims those estates under a purely legal title, which he has not yet established, or brought any action to establish, at law; and so claiming he asks this relief against persons in possession peaceably and without fraud. But it is a well-settled rule, that in the absence of fraud and collusion, and where there is no imminent danger of loss, this Court will never interfere between parties so situated, even to prevent waste, *Davenport v. Davenport* (a), much less to grant a receiver of the rents and profits: *Lloyd v. Passingham* (b), *Armitage v. Wadsworth* (c), *Crow v. Tyrrell* (d), *Lady Shaftesbury v. Arrowsmith* (e); which show the extreme length to which the Court carries

(a) 7 Hare, 217.

(b) 16 Ves. 59.

(c) 1 Mad. 189.

(d) 3 Id. 179.

(e) 4 Ves. 66.

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the principle of non-interference in the case of real property.

This rule, well established by the earlier and not disputed by the later decisions, and recognised as indisputable as recently as the Report of the Chancery Commissioners, is founded upon principle. The Court will not assume jurisdiction where it cannot protect those who shall act in obedience to its decree. Tenants, after paying rent to a receiver appointed by this Court on peril of being committed for contempt, would still be exposed to actions by other claimants from which this Court could not protect them. Suppose a third claimant were to establish his title, he would not be bound by the order for a receiver, the direction as to poundage, or the like. He might repudiate all that had been done, and bring his action against the tenants as if no decree had been made.

It will be said that the Plaintiff cannot proceed at law, until he has established his title in the House of Lords. But that we deny. The right of inheritance of a peer is not determinable by the Lords, but by a court of law: *The King v. The Earl of Banbury* (a). All that the House of Lords has to consider, is whether the Plaintiff is entitled to the Earldom. That may be referred to another Committee of Privileges, may remain undecided for years, pending which it is impossible to suppose that the Plaintiff is precluded from trying his right to the property at law.

Then the rest of the bill is met by the plea. The rest of the bill relates to such of the estates as the Plaintiff alleges to be vested in the Defendants as trustees for his benefit, and which may be called, for distinction, the unsettled estates. To these the Plaintiff says he is entitled as Earl of *Shrewsbury*; and to so much of the bill as relates to

(a) Skin. 517.

these unsettled estates, the Defendants plead that he is not Earl of *Shrewsbury*; and by their answers they aver the points in which his pedigree is defective.

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Mr. *Rolt*, Q. C., and Mr. *Shapter*, Q. C., for the Plaintiff:

The Defendants assume that the equity of the bill depends upon the Plaintiff being Earl of *Shrewsbury*; but the equity of the bill is this, that, whether the property be real or personal, if the dispute be bonâ fide, if the Plaintiff have a reasonable case, if Defendants have not a better,—a *fortiori*, where they admit they have no title,—if there be danger of loss while the litigation is going on, and if that litigation must go on in another Court, this Court is not so infirm as to be obliged to refuse relief: *Mordaunt v. Hooper* (a), *The Earl of Fingal v. Blake* (b), *Lloyd v. Lord Trimleston* (c), *Bainbrigge v. Baddeley* (d), and *Middleton v. Sherborne*, there cited. Here all these circumstances concur: danger of loss, and irremediable injury to the persons ultimately entitled,—the rents being 35,000*l.* a-year, 5000*l.* of which are payable by tenants who have attorned to no one; the Plaintiff's title, supported by an overwhelming balance of evidence, and all but adjudged by the House of Lords to be established; and the Defendants admitted upon this demurrer to have no title. The Plaintiff, therefore, is entitled to a receiver, and still more clearly to an injunction.

The VICE-CHANCELLOR.—You say the Defendants have no title; but they have possession, and in real estate possession is *primâ facie* evidence of title.

Mr. *Rolt*, Q. C.—They have possession merely “by favour of the tenants.” Possession so acquired has not the

(a) 1 Amb. 311. (b) 2 Moll. 50. (c) Id. 81.
(d) 13 Beav. 355; S.C., 3 M'N. & Gor. 413.

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quality of an authorised possession; the Court looks at the quality of the possession, and will not leave the question at the caprice of the tenants: "To hold that a devisee let into possession by favour of the tenants acquires any right, would be to adjudge the possession according to the will and pleasure of mere casual persons who happened to be the occupying tenants at the death of the testator:" Per Sir A. Hart, in *Lloyd v. Lord Trimleston*. The Defendants' argument would have been equally good in the mouth of the tenants, yet the Court would have allowed any number of interpleader suits by the latter, and ordered payment in each case into court. If so, why not allow this, which is a consolidation of all future suits of that nature?

With respect to the authorities cited *contrà*, and others that might have been cited, it is clear that, as regards the practice both as to granting a receiver and on the question of waste, they are conflicting, and the earlier cases would not now be upheld. We rely on the authority of Sir A. Hart in *The Earl of Fingal v. Blake* (a), and *Lloyd v. Lord Trimleston* (b), and upon that of Lord Langdale and Lord Truro in *Bainbrigge v. Baddeley* (c). At the present day the Court will not recognise a distinction between real and personal property, admitted on all hands to be so unreasonable: *Jones v. Jones* (d), *Haigh v. Jaggard* (e). In *Davenport v. Davenport* (f), the only recent authority cited against interference to prevent waste, nothing could be weaker than the case of the Plaintiff, who had been nineteen years out of possession.

The VICE-CHANCELLOR.—One point suggested by *Jones v. Jones* is, whether you ought not to have brought ejectment before filing this bill.

(a) 2 Moll. 50. (b) Id. 81. (c) 13 Beav. 355; S. C., 3 M'N & G. 413.
 (d) 3 Mer. 173. (e) 2 Coll 235. (f) 7 Hare, 217.

Mr. *Rolt*, Q. C.—Not until we have succeeded in the House of Lords. The decision of that House will be conclusive at law, whereas no decision at law would avail the Plaintiff before the House of Lords. In *The Earl of Banbury's case* (a) there was no commission from the Crown, and all that was there decided was, that without such a commission the House has no jurisdiction. But when such a commission has once issued, no other Court has jurisdiction: *Earl of Strathmore v. Countess of Strathmore* (b).

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Then as to the plea: the plea merely denies what the bill avers to be denied; and it is precisely on the ground of that denial,—on the ground of there being that dispute existing between the Plaintiff and the Defendants, that the Plaintiff rests his case. Pending that dispute, which can only be settled in the House of Lords, and which the Plaintiff has done his utmost to get decided, he is entitled to the relief prayed.

The plea, therefore, as well as the demurrer, must be overruled.

[They cited also *Dean v. Allen* (c), and, as to the averment of pedigree, *Ford v. Peering* (d)].

Mr. *Wickens*, for the Prince and Princess *Doria Pamphili* and the Duke and Duchess of *Sora*, took no part in the argument.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This demurrer and plea must be allowed.

Jan. 22nd.

Judgment.

(a) Skin. 517. (b) 2 Jac. & W. 541. (c) 20 Beav. 1. (d) 1 Ves. jun. 72.

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I have not examined all the cases which were cited yesterday, but I have referred to one which is a most valuable repertory of all the authorities on the subject. That is the case of *Haigh v. Jaggard* (a), in which Lord Justice *Knight Bruce*, when Vice-Chancellor, expressed a strong opinion that the arm of this Court is long enough to reach clear cases of destructive waste, even where the party committing such waste is in possession, and the party seeking to restrain the acts of waste is out of possession and his title is denied by the Defendant. That I conceive to be the conclusion to which the authorities lead, though there has been some difficulty in arriving at such a conclusion, and it has only been arrived at by degrees, and it was necessary, in order to establish it, to hold that several of the earlier cases would not now be decided as they actually were.

That was clearly the result of the authorities referred to in the case of *Haigh v. Jaggard*, and there the Vice-Chancellor says: "I am not convinced that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a Court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion house upon it, or other such acts" (b). He then proceeds to say that one of the most remarkable cases was that of *Smith v. Collyer* (c), before Lord *Eldon*, as to which he makes the observation, that he is not perfectly satisfied, that, in the same circumstances as occurred there, the Court would not now grant an injunction, adding,

(a) 2 Coll. 231.

(b) Id. 235.

(c) 8 Ves. 89.

"The Plaintiffs seem there to have been in possession, substantially, and infants." Then he proceeds to enumerate the authorities ; and to those authorities I have been indebted, to a great extent, in forming my opinion upon the subject.

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As regards the demurrer, it relates solely to the settled estates. The settled estates are estates, which, by an Act passed in the reign of George the First, are now the property of such person, if any such there be, who shall eventually establish that he is Earl of *Shrewsbury*, and in lineal descent from the first Earl. The Plaintiff avers by his bill, that he is that person. At the same time, he states that his title is in question ; that proceedings have been taken to establish it before the House of Lords ; and that he has very nearly arrived at a satisfactory establishment of his title, there being only three points which appear to be in any way hostile to the conclusion at which he has sought to persuade the House to arrive ; and with regard to two of those points, he avers, that some members of that august body have expressed an opinion in his favour.

In that state of things, he says, I find two of the Defendants, Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, in possession of my property under the following circumstances : Notwithstanding an Act expressly prohibiting any alienation by the several persons who shall come into possession of the property as there mentioned, including the last Earl (the Act contained an exception in favour of alienation by any Protestant Earl, but that exception was repealed by a subsequent Act of the Queen), the last Earl took upon himself to execute certain instruments purporting to be disentailing deeds, and a will purporting to devise the property to the Defendants ; and immediately upon his decease the Defendants, on behalf of themselves and Lord *Edmund Howard*, who claims to be interested under the will, claimed, and they still claim, to be en-

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titled to all the said settled estates or moneys, by virtue of the two deeds that were so executed by the last Earl.

The bill states, that the Defendants Mr. *Hope Scott* and Mr. Serjeant *Bellasis* rest their claim upon that ground; but in another passage of the bill, I find it stated, that their cestui que trust Lord *Edmund Howard* claimed, and his counsel rested his claim to be heard upon the question of the peerage before the House of Lords, upon the ground that the question as to the peerage would in effect decide the question as to the property. Upon that footing he presented himself before the House of Lords; and upon that footing, as the bill avers, he was allowed to appear before that House. Whether that averment be correct, is disputed; but, of course, I must take it to be so on demurrer; and according to that averment, there is, at all events, a colour of claim in Lord *Edmund*, and I cannot look upon his claim as a groundless assertion of title by a total stranger.

Then the bill states, that, upon the death of the late Earl, the Defendants Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, professing to act as trustees under his will, by favour of some of the tenants of the settled estates entered into the receipt of the rents and profits of the greater part of the settled estates; and they notified to all the tenants of all the settled estates, that they were entitled to receive all the rents of the settled estates. I notice this, because it may be important to do so. The bill does not state that they entered into territorial occupation of these lands by favour of the tenants, but it simply states that they entered into the receipt of the rents and profits (no doubt by the favour of the tenants,) of all the settled estates.

I ought perhaps now to mention, that this is not a general charge as to the whole property. There is a fur-

ther and different part of the bill, to which the plea applies. There are certain other estates which, as the bill avers, are vested in the same two Defendants, upon trust for whoever may eventually be held to be entitled to the Earldom, such estates being in a different position from the settled estates, in which the legal interest solely is in question. To that portion of the bill a plea is put in, that the Plaintiff is not the Earl of *Shrewsbury*, and is not a descendant of the first Earl. The charge, therefore, as to entering into possession of the rents is confined apparently to the settled estates.

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Then the charge as to timber avers generally, "that the last-named Defendants have cut down considerable quantities of timber on the said estates, and some of it is of an ornamental character"—(not alleging that it is timber that was planted or left standing for ornament—not leading, therefore, to any conclusion that the Defendants have committed equitable waste), "and some of it was not ripe for cutting; and they have sold the same and received the proceeds thereof; and they threaten, and intend, to cut more timber growing on the said estates, to the great injury and detriment thereof: and they are now cutting down timber growing on part of the said settled estates at *Alton*, in the county of *Stafford*."

Then the bill prays [His Honour read the prayer (a).]

With regard to the first part of the relief prayed by the bill, namely the receiver, which is really the substantial part of the case, I apprehend, that, as to the settled estates, it is too clear for any contention at the present day, that this Court will not interfere at the instance of a person alleging a merely legal title in himself against other persons in possession of the estates, to grant a receiver and

(a) *Supra*, p. 102.

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put them out of possession. In *Lord Fingal v. Blake* (a), and in the subsequent case of *Lloyd v. Lord Trimleston* (b), there are some observations of Sir. A. Hart, which seem to have a leaning in favour of such interference, and to which I shall refer presently; but there is no decision which in the least bears out the proposition that the Court will interfere under such circumstances; for it is manifest, that, in the first of these cases, the receiver was granted by consent. That there may be a possible case in which this Court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if no steps were taken, I can understand; but I have found nothing that bears any resemblance to the doctrine contended for, that, at the instance of a person alleging a mere legal title, this Court will interfere against another who is in possession, to deprive him of that possession. I have known, and everybody must have known, numerous instances where ejectment has been brought for very valuable property upon a merely legal title; yet I think I may say, that for the last twenty years, if not for longer, no one has ever dreamt of approaching this Court, however heavy the litigation between the parties, for the purpose of obtaining a receiver, until he had established his right at law to possession of the estates.

The ground of the rule adopted by the Court in this respect I conceive to be extremely sound: the general ground being, that the Court cannot interfere with a legal title of any description unless there be some equity by which it can affect the conscience of the Defendant. Where there is an entire want of privity between the Plaintiff and the Defendant, and the Defendant is simply a wrongdoer at law, this Court does not take upon itself to interpose, unless in certain very exceptional cases.

(a) 2 Moll. 78.

(b) Id. 81.

One such exceptional case is that of destructive trespass against property of which another is in possession; a mere trespasser comes upon property as to which he recognises your right to possession, and invades that property either by mining or by cutting down timber without a colour or shadow or pretence of title, and the property may be destroyed before you can arrest his proceedings at law. But even that was not recognised as a case for the interference of the Court until after a considerable struggle in the mind of Lord *Thurlow*, who, I believe, is to be considered as having established the doctrine that in such a case the action of the Court may be safely invoked, nor until he himself had several times refused to act under such circumstances.

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Subject to these exceptional cases, the rule is as I have stated. As regards the enjoyment of the ordinary rents and profits of an estate, this Court has never assumed a right to interfere with that title, which the law confers upon every *terre tenant* in possession of real property,—a title to be traced, no doubt, to the feudal doctrines of our law, by which the lord had a right to require that he should always be able to know his tenant; possession on the part of the tenant was the best means of affording to the lord that knowledge; and the tenant who owed duties to his lord, (and very onerous those duties were at the period when the feudal law was in its full vigour), had a right to all the benefit of the property in respect of which he was bound to perform such duties. The title by possession has been always treated by the law as so sacred that it is well known to many of us from the cases to be found in the books and otherwise, that some estates in this kingdom are held without the least pretence of any other title. Many estates have been originally entered upon simply under a devise from a mere tenant for life, proved most satisfactorily to be merely tenant for life; and yet, upon the ground that the Court recognises the person in possession as the owner till

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some other person by a stronger title has cast him out, unless it can find something in the shape of fraud, which was the case in *Huguenin v. Baseley* (a), something by which it can fasten upon the conscience of the person so in possession, the Court invariably refuses to interfere.

But although I do not find any case in which this Court has actually interfered under such circumstances, I do find observations, which certainly appear to have some leaning in favour of interference, attributed to a very eminent Judge of long experience in the practice and principles of this Court, Sir *Anthony Hart*, when Lord Chancellor of *Ireland*, in the case of *Lord Fingal v. Blake* (b), and the following case of *Lloyd v. Lord Trimleston* (c).

The case of *Lord Fingal v. Blake* was this :—first, there was an application before action brought, which was refused. Then, after action brought, some discussion took place, and at last there was an arrangement by consent, and a receiver was appointed, and all the subsequent proceedings took place after that consent had been given. Then a further application was made after the result of the trial and the several other proceedings had in the cause. That being the position in which the matter stood, Sir *Anthony Hart* says, on the last application that came before him, “What I propose to do is only a temporary interference as to the possession of the estate; and I think it is in conformity with the principles of this Court to direct not only an account of the rents received by the heir, and of the produce of the timber cut down by him, but also to direct a receiver to take the possession. The stress of the argument has gone upon the supposed imperfection of Lord *Fingal’s* title, as beneficially entitled to take in the contingency of the failure of the precedent estate. But I put Lord *Fingal’s* beneficial title out of the question. The argument by Mr.

(a) 14 Ves. 273.

(b) 2 Moll. 50.

(c) Id. 81.

Holmes has put it most strongly, that there is no devise of the real estate, that there is a pure intestacy as to the seisin of the real estate, and that the effect of the devise extends only to an equitable obligation on the legal estate in the hands of the heir. If this were so, if there was no devise away from the heir, if the inheritance were now devolved upon the Defendant, the heir at law, I certainly should ponder long before taking it away from him. But I am of opinion the real estate is devised away from the heir. It is admitted on all hands, this will is sufficient in form if sufficiently expressed ; and I cannot see how it can be doubted that the whole real estate has been given to the trustees, although there may be indeed a question whether the estate so given to the trustees is temporary or perpetual”(a). Then after going through the language of the will, he says: “The consequence of this is, that, inverting the argument used, the heir was a wrong-doer from the beginning, and he is not to put the devisees to recover the estate by ejectment while the Court has the control to direct the possession. * * * If indeed the heir took by descent, the Court would look at his rights with great deliberation, and not without apprehension would it dispossess him of the legal possession ; but here the heir has no legal possession, but his title is only worked out by showing either that the trustees took only a chattel interest, of which the purposes have been answered, or that there is no valid subsisting devise to them whatsoever. The former can only be shown to the Court by the Master’s finding ; and in the meantime the Court must take care of the issues and profits of the land.” Then he says, if “the limitations were palpably too remote or clearly uncertain,” he should not be disposed to interfere (b).

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All that is in favour of non-interference in a case where there is any legal possession or right in the heir ; and the

(a) 2 Moll. 74, 75.

(b) Id. 76, 77.

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result is, that in that case I do not find anything to support Lord *Talbot's* contention.

In *Lloyd v. Lord Trimleston* (a), there was an observation which seemed more nearly applicable to one of the charges in this bill. There the suit was instituted by Lady *Trimleston*, claiming as devisee under her husband's will, to have his will established. Upon the death of Lord *Trimleston* in 1813, she had continued in possession of the mansion house and obtained possession of lands from the tenants; and the heir at law, being unable to change the possession, prevailed upon the trustees under a prior deed, made in 1810, to use their legal estate for that purpose. They accordingly brought their ejectment; and in 1820, Lady *Trimleston* was evicted, and the then Lord *Trimleston*, or his son the Hon. *Thomas Barnewall*, was let into possession of the mansion house at a nominal rent. Lady *Trimleston* filed her bill claiming as devisee for life, and a motion was made for a receiver. The Lord Chancellor said, "The substantial injury would be, if there was danger that the fund might be lost by the insolvency of the trustees. If there is no want of substance in the trustees to make good what they have received, or without wilful default might have received and may hereafter receive, since they entered into the possession, no ultimate injury will be done. The result of the proceedings at law touching the will is, that at present a verdict stands against the will. Then Lord *Trimleston*, being the heir at law, and the only verdict existing being against the will, has, I think, a title to be in possession" (b). So far, I find no difficulty. The case was one of the clearest cases imaginable. The heir had availed himself of an outstanding interest in trustees. and a verdict had been obtained against the Plaintiff. The attempt was to oust the heir of the possession that he had so got by a person as against whom at present the title had

(a) 2 Moll. 81.

(b) Id. 83.

been determined. But then Sir *Anthony Hart* makes this observation, upon which a great deal of stress was laid during the argument : "*The possession which was acquired by the devisee had not the quality of an authorised possession.* On the death of the ancestor the heir has title to enter and retain possession until the Court interposes. If it be said that the devisee, being let into the possession by the favour of the occupiers, acquires any right, that would be to adjust the possession according to the will and pleasure of mere casual persons who happened to be the occupying tenants at the death of the testator. But my opinion of the law is this, that *the heir has upon the instant of the death of his ancestor in possession a right to enter and to turn out by the shoulders any other person, except only the widow, who has a right to stay until her dower is assigned to her*" (a).

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Now I have a little difficulty, I candidly confess, in comprehending that observation. If it was meant to apply to anything more than a fraudulent occupation or possession,—if it was meant to apply to the case of a fair contest between a devisee and the heir, the devisee being more fortunate in getting the tenants to attorn to him than the heir, I cannot understand it; for it does not seem to be law to say that the devisee, being let into possession by favour of the tenants, does not acquire any right. Unquestionably, he does acquire a very substantial right. If the devisee obtains possession of the estate by the tenants attorning to him, he holds the estate till some other person can shew that he, as heir, or otherwise, has a better right to possession. It seems to me, that the observations of the Lord Chancellor must have been meant to apply to some case of fraudulent or forcible possession, which the law will not recognise; because he speaks of the heir having a right to enter and "turn out" the devisee "by the shoulders."

(a) 2 Moll. 83.

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[Mr. *James*.—There the devisee, *Lady Trimleston*, had obtained possession by favour of the tenants, and then complained that the heir-at-law had got the trustees to use their legal estate to evict her.]

The VICE-CHANCELLOR.—So I observe. The Lord Chancellor said, the devisee had no better right in any way. In truth she had not the legal estate, and those who had the legal estate had used it against her, and in favour of the heir; and the heir having obtained a verdict, the Lord Chancellor thought, justly and properly, it was not a case in which he could interfere. Sir *Anthony Hart* was much too great a judge to mean—and it is manifest, from what he says in the subsequent passage as to the right of the heir to enter and turn out the devisee by the shoulders, that he did not mean—to apply the observation I have read to such a possession, on the part of the devisee, as would put the heir to legal process for the recovery of his right. He could not have meant such a possession as that of the Defendants to this bill :—a possession by persons claiming a right, and who, by favour of the tenants, and by getting the tenants to attorn to them, have entered into the receipt of the rents and profits. That is a possession, which, I apprehend, it would be found extremely difficult to dispute, except by ejectment. I know of no process by which such a person could be turned out by the shoulders, or dealt with in any way except by formal proceedings in a court of law.

Considerable inconvenience may be occasioned in this as in many other cases, in consequence of the rule which the law has thus adopted, out of respect to title by possession;—indeed, the law goes further, for if the tenant without attorning to any one chooses to hold adversely for his own benefit, until the possession is converted by lapse of time into an absolute interest, he is allowed to take his chance of re-

maining undisturbed until a better title is established. But whatever inconvenience may be the consequence, I find nothing in the observations of Sir *Anthony Hart*, or elsewhere, to justify interference upon that ground. I find nothing in the allegations in this bill that I can treat as stating a fraudulent collusion between the Defendants and the tenants. The bill alleges expressly, that "the Defendants notified to all the tenants of all the settled estates, that they were entitled to receive all the rents of all the settled estates;" that is to say, by virtue of their alleged right under the will, they notified to all the tenants that they were entitled to receive all the rents; and some of the tenants adopted that view and attorned to them. I cannot read that passage as amounting to any case of fraud which would justify the Court in interfering. There is not a single authority in the books for the appointment of a receiver for a person out of possession, against a person in possession, the person out of possession simply alleging a legal title, nor can any shadow of a dictum be found to support such a view. And if authorities to the contrary are less numerous of late years, it is because attempts of this kind have of late years been less frequent than they were formerly.

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With regard to the large amount at stake, I apprehend that makes no difference in the principle upon which the case is to be decided. That principle is the same whether the rental be, as here, 35,000*l.*, or only 2,000*l.* or 3,000*l.* a-year. And with regard to the argument that irremediable injury will be occasioned in the loss of the rents and profits in case a receiver is not appointed, I think there is the same injury done in a vast number of cases from interfering with the rents and profits against a person having legal possession. To deprive him of that possession may cause him irreparable injury. All his arrangements in bringing up his family may be interfered with. The Court may be inflicting as much injury by granting a

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receiver, as by withholding it. And the result is, that I can neither find any semblance of authority, nor can I conceive of any rational ground upon principle, for holding that where one person is in possession of the rents and profits, claiming to be the holder by a simple legal title, and another person claims to hold by a like legal title, the former can be ousted in this Court, until that legal title has been finally determined at law.

The next point, before coming to the question as to the timber,—and it is one upon which some reliance was placed in argument,—is the charge in the bill that there are rents to the extent of 5000*l.* a-year arising from certain estates, the tenants of which have not attorned to either of the claimants. The answer to that part of the case is, that here again the Plaintiff is standing on his legal title. He does not tell the Court that he has taken any proceedings against the tenants in question. He cannot at present assume that the tenants will not pay him in the event of his taking such proceedings; and it is clear, that, if he took such proceedings against any tenant, he would either recover the rent, or the tenant would file his bill of interpleader.

This leads me to notice the argument that the present bill is, in truth, no more than a consolidation of several bills of interpleader, and that, if the Court interferes upon a bill of interpleader, the same interference ought to take place at the instance of one of the litigant parties. But the principle is as different as can be conceived. The Court acts upon bills of interpleader, because a tenant, who is perfectly innocent, and who cares nothing about the dispute between two claimants, is left in uncertainty, upon the death of his landlord, as to who is his new landlord. He is willing to recognise fully the title of the new landlord whenever he is ascertained. But *A.* says, he is the late landlord's heir or devisee, and the person entitled to sue the tenant for

rent; and *B.* says the same. The difficulty has been caused not by the tenant but by the deceased landlord having devised the property, by uncertainty who is heir, or the like. There are two persons claiming; the tenant knows nothing of either; he only desires to be discharged. That the tenant under such circumstances should be indemnified and saved harmless is manifest equity; and the tenant, therefore, has his right to interpleader. But how has that any bearing whatever upon the right here claimed by the Plaintiff, for one of the claimants who is out of possession to come here and oust, in effect, by means of a receiver, the other claimant, who has been more fortunate in obtaining possession, and with it the legal right which possession gives?

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To return, however, to the charge as to the rents payable by tenants who have not attorned to either party, and the danger of those rents being lost: it does not appear to me that there is any necessity for those rents being lost. They will be recovered either by the Plaintiff bringing actions for them against the tenants, and the tenants paying them when the Plaintiff has brought those actions; or, if the tenants do not pay them in those actions, they will take care, for their own sake, to pay them here. One of these two things they must do; and whichever course they take, the rents will be paid, and the Plaintiff will have his full and effectual remedy.

The part of the case which relates to the timber is really the only part of it that can occasion any difficulty or hesitation. With regard to the timber, the authorities certainly are exceedingly strong against the right to any relief upon a bill of this description, even where the bill contains strong averments of waste by the Defendant, that Defendant being a person in possession and claiming under a legal title. At the same time, there are authorities looking the other way; and there is not only upon this point the observation of Sir

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Anthony Hart, to whom, as I have said, every deference is to be paid for his knowledge both of the principles and practice of the Court, but there are also the authorities enumerated by Vice-Chancellor *Knight Bruce*, in his judgment in *Haigh v. Jaggard (a)*, and which, no doubt, were the very authorities present to the mind of Sir *Anthony Hart*, besides many other cases with which he had become acquainted in his long experience, and which might not have found their way into the books.

In looking through those authorities it is easy to see that there has been some fluctuation as to whether relief should be given even in a plain and manifest case of this description, where *A.*, being in possession of a close, and his possession being undisputed, a mere trespasser comes underground to take his mines, or enters above-ground by collusion with the tenant (and he could not enter except by collusion with the tenant), and removes a part of the substance of the inheritance, be it timber or be it mineral.

At first, Lord *Thurlow* refused relief even under such circumstances ; but afterwards (as Lord *Eldon* notices in numerous cases) Lord *Thurlow* changed his mind, and considered that relief ought to be given. Perhaps the best instance of that is a case in which both processes took place in Lord *Thurlow's* mind, viz. an inclination in the first instance strongly in favour of the legal title, and then a change afterwards, upon the ground that there might be equitable circumstances affecting the conscience of the Defendant, which would entitle the Court to interfere. That is the case of *Hamilton v. Worsefold* published in a note to *Courthope v. Mapplesden (b)*, as shortly stated from a note by Sir *Samuel Romilly* : " The bill stated that the Plaintiff was seised in fee, that his title had but recently accrued, and the tenants had not yet paid him any rent ; that the

(a) 2 Coll. 236.

(b) 10 Ves. 290.

Defendant *Worsefold* pretended to have some claim to the estate, and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other Defendants, the tenants"—(so that there is a difference between that case and the case before me; for here the bill alleges simply the receipt of the rents and profits by favour of the tenants; not, as in *Hamilton v. Worsefold*, an entry upon the material property with the permission of the tenants, who were entitled of course to keep the Defendant out of possession)—"and had cut timber, and threatened to cut more. The bill therefore prayed that *Worsefold* might be restrained from committing waste, and that the tenants might be restrained from permitting it."—(It is clear that the Plaintiff's case was not simply that *Worsefold* had got the rents and profits from the tenants, but that there was actual collusion between the tenants and the Defendant; and that, by means of such collusion, and by aid of the tenants, the Defendant was admitted into possession and committed the waste, and the tenants were made Co-defendants)—"The Lord Chancellor, upon the motion for the injunction, at first had some difficulty about granting it, *Worsefold* being a mere trespasser; but at length his Lordship granted the injunction against both *Worsefold* and the tenants."

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In *Courthope v. Mapplesden*(a), in which that case was cited, the Plaintiff charged the Defendant with entering and committing waste by collusion with the tenant; and Lord *Eldon* said: "I have no difficulty in granting the injunction in this case, but I will not be bound as to what is to be done upon a mere trespass, though it is strange that there cannot be an injunction in that case to prevent irreparable mischief, the rather as there is a writ at common law," (that is the writ of estrepement referred to by Vice-Chancellor *Knight Bruce* in *Haigh v. Jug-*

(a) 10 Ves. 290.

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gar (a), and which is now abolished), "to prevent the further commission of waste during the trial; whereas, if the Court will not interfere against a trespasser, he may go on by repeated acts of damage perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases, the tenant colluding; and if the tenant's act is waste the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction."

Of all the cases to be found in the books, that is the one which has gone the farthest as to the interference of the Court; it does not appear there, so far as I can see, that the tenant was made a Co-defendant; so that it goes one step further than the case of *Hamilton v. Worsefold*; but the charge was the same, that it was by collusion with the tenant, and Lord *Eldon*, carefully guarding himself against a mere trespass, says, "The tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction." To that length the Court seems to have proceeded, but no further, as far, at least, as the authority of that case extends.

There are numerous instances in which Lord *Eldon* adverted, as he did there, to the difficulty of interfering in a case of mere trespass. Perhaps the strongest instance of that kind was that of *Smith v. Collyer* (b), in reference to which Vice-Chancellor *Knight Bruce*, in *Haigh v. Jaggard* (c), makes this observation: "I am not perfectly satisfied that in the same circumstances (as far as they are to be collected from the report,) this Court would not now grant an injunction. The Plaintiffs seem there to have been in possession, substantially, and infants." In that case there was an outstanding mortgage, which, as I presume from the view taken

(a) 2 Coll. 235.

(b) 8 Vcs. 89.

(c) 2 Coll. 236.

by the Vice-Chancellor, he conceived to be held for the infant Plaintiffs, so that the possession of the mortgagee was substantially a possession in the infants; and the Defendant, who was cutting down timber in virtue of his alleged right as heir, was out of possession, and had no legal interest that could properly have been said to be interfered with had the injunction been granted. That only shows how strong the view of the Vice-Chancellor was as to the necessity for this Court to take care not to interfere to prevent the wrongful acts of a mere wrongdoer in cases where there are no such special circumstances to justify its interference.

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Again, in *Norway v. Rowe (a)*, which is another of the cases referred to in *Haigh v. Jaggard*, Lord *Eldon* alludes to the same sort of distinction. He says (b), "I recollect hearing from either Lord *Thurlow* or Lord *Bathurst*, that if the bill contained a passage, which is frequently inserted now, that the Defendant pretends the Plaintiff is not entitled to the estate, he stated himself out of Court. There was another case where the Defendant to a bill to restrain waste, stated that he was in possession of the estate by a title of his own, admitting that he was let into possession by the Plaintiff's tenant without his knowledge: the Court said, that being a breach of the tenant's duty to his landlord, the Defendant's title was for this purpose to be taken as no better than the tenant's; and though, if the Defendant had obtained possession without participating in that breach of the tenant's duty, the Court would not have interfered, they would not permit him to avail himself of a possession so obtained; and upon that ground he was restrained."

These are clear cases, in which there being a landlord and tenant, the landlord being the person who has made an

(a) 19 Ves. 144.

(b) Id. 154.

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actual demise, and the tenant, in clear breach of his duty to that landlord to whom he owes allegiance, having admitted a stranger, the Court says that the stranger's act is to be the act of the tenant, or, as Lord *Eldon* says, is to "have the quality of the tenant's act." The strongest case possible in that respect is that of *Hamilton v. Worsefold*, as there the Plaintiff stated that he was not yet in possession, the tenants had not paid him any rent, and his title had only recently accrued; that case is more like this than the case of a mere demise by a living landlord, from whom the tenant took his demise and against whom it was a flagrant breach of the tenant's duty to admit anybody into possession.

These being the only authorities I can find, except the case of *Haigh v. Jaggard*, for saying that the Court will in such irreparable cases interfere, I come to the case of *Haigh v. Jaggard* itself, which is rather a summary of those authorities, and where the Vice-Chancellor simply says, that he is not convinced, that, where a man is in possession, however full and complete, of an estate, and swears by his answer that his own title is just and valid, and that his adversary's title is unjust and invalid, that case "does of necessity prevent a Court of Equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion house upon it, or other such acts."

I apprehend that the utmost extent to which that observation of the Vice-Chancellor goes as deduced from the authorities, is, that he was not satisfied that there may not be such flagrant acts of what the Court calls, in some instances, malicious waste,—acts which no man, as mere owner in ordinary possession of the property would do, but indicating on the face of them fraud, in which the Court could not

interfere. For instance, a man says "I know I am in adverse possession, I know there are people litigating with me and claiming this estate against me, and I know they are likely to succeed; and I will take care when they come they shall find the estate a desert. I will cut down every tree on the estate, and I will pull down the mansion house." I am not prepared to say, any more than the Vice-Chancellor, that such a case as that would not be fraud; or that, in such a case, the Court, if it once arrives at fraud, would not be strong enough to interfere, and prevent such acts from being perpetrated.

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The Vice-Chancellor then says "In the case of *Jones v. Jones*, before Sir *William Grant* (whose language at page 173 of the report is well worthy of observation)"—and which I will come to presently—"the Plaintiff was out of possession, and there does not appear to have been a distinct allegation of the commission or threat of any waste or destruction." (It appears now, by a note to the report of *Davenport v. Davenport* (a), that the bill in *Jones v. Jones* contained a distinct and positive allegation of waste). "Such a case as *Mortimer v. Cottrell*, reported by Mr. *Cox* (b), would, I venture to think, probably not receive at the present day the decision which it received in 1789." Then he refers to several other cases, all of which I have examined, one or two of them being only the common cases of application to restrain the working of mines; but the rest having all a more pointed bearing upon the subject which the Vice-Chancellor was discussing. He refers also to *Vice v. Thomas* (c) in the Stannaries Court, where a demurrer was allowed to a petition heard before the Prince Consort as Lord Warden of the Stannaries, assisted by

(a) 7 Hare, 219, n. (b).

(b) 2 Cox, 205.

(c) 4 Y. & C. 538; and *S. C.*, re-

ported in a separate volume by Mr. *Smirke*.

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Lord *Brougham* and Mr. Baron *Parke*, upon the ground of the remedy being at law. The Vice-Chancellor remarks, that the petition only asked for a decree for an account; and so far the case would be important as bearing upon the first branch of this case, viz. the receivership. It would not have a bearing as to the question of waste, because I do not observe—and I have looked at the full report of the case by Mr. *Smirke*,—that any inquisition was there asked for; all that was asked for was an account of the minerals sold.

And now, having regard to the authority of Vice-Chancellor *Knight Bruce*, I will look to the case of *Jones v. Jones (a)*, and see what the effect of that case must be upon the present application of Lord *Talbot*. The case of *Jones v. Jones* came before Sir *William Grant*, who unquestionably must be taken to have been perfectly well acquainted with all the authorities before Lord *Thurlow*, and the authorities before Lord *Eldon*; and the observations that had been made both by Lord *Thurlow* and Lord *Eldon*, upon this particular class of cases. And in *Jones v. Jones* the bill stated that *William Jones* deceased was at the time of his death seised of large estates; that he died intestate in January, 1814, leaving the Plaintiff his heir at law, who, at his death, became entitled to all his real estates. It then stated fraud in the obtaining of a will, and that the will had never been proved; but that the devisees had entered into the possession of the estates thereby given to them; and the trustees and executors had also proceeded to act under the trusts thereby reposed in them; that the Plaintiff intended to bring actions for the recovery of the estates; but that he could not proceed on account of outstanding terms, and that he could not hope for a fair trial within the county; and he prayed that full discovery

(a) 3 Mer. 161.

might bemade ; and asked to restrain the setting up of the outstanding terms, and to restrain them from selling or disposing of the estates, and from committing any spoil, waste, or destruction thereon. It is obvious how imperfectly the bill is reported, because, as reported, it does not mention waste at all. But it appears from a note to the case of *Davenport v. Davenport* (a), that the bill was found on examination to contain very positive and distinct averments of waste, in respect of which relief was asked. The Defendants demurred, because, although the Plaintiff sought to restrain them from setting up the outstanding terms, he did not aver that there were any. Sir *William Grant* says, "If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given," (then he states what they were) ; "but the Plaintiff concludes with praying relief upon the same objects with reference to which he had before stated that he only wanted a discovery in aid of an action. For he prays that this Court will declare that the pretended will was not the true will of the late *William Jones*, and that the same may be delivered up to be cancelled ; and, as consequential on that relief, he prays an account of rents and profits of the real estate, an account of the personal estate, of debts and funeral expenses, an inquiry as to next of kin, and a distribution of the clear surplus. It is impossible that, at this time of day, it can be made a serious question whether it be in this court that the validity of a will, either of real or personal estate, is to be determined." As to that part of the case, therefore, there could be no relief. "There is, however," he proceeds to say, "an alternative prayer, that the Court will direct an issue to be tried ; and then certain other directions are sought as applicable to that alternative. Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition has been made

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(a) 7 Hare, 219, n.

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to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment; and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment;" adding, that if he can have no issue, neither can he have those consequential directions which the bill asked only on the supposition that an issue was to be granted. "As to the title deeds," he continues, "the bill merely states the fact that the Defendants have the possession of them, but not that they are in any way necessary to enable the Plaintiff to recover at law; he stands solely on his title as heir, and does not show how the required production could be of the least service to him. As Lord Rosslyn says, in *Lady Shaftesbury v. Arrowsmith*, 'The title of the heir is a plain one, and it is a legal title; all the family deeds together would not make his title better or worse.'" Then after saying that the Plaintiff came to ask that the Defendants might be restrained from setting up outstanding terms, but did not aver that there were any such, he says this, "There is a prayer that in the meantime (that is until the trial of the issue or action) the Defendants may be restrained from committing any spoil, waste, or destruction on the said *William Jones's* real estates, and from selling or disposing of, or charging and encumbering the same, and that a receiver may be appointed." Then comes the passage which Vice-Chancellor *Knight Bruce* says he thinks is deserving of special attention: "No case was cited in which the Court has interfered at the suit of heir or devisee to restrain waste, spoil, or destruction by either, while they are litigating their adverse rights in a court of law. One should think the case of the devisee a stronger one than that of the heir, because till the will is set aside the *prima facie* title is in the devisee." (He, therefore, differs a little from Sir *Anthony Hart* in *Lloyd v. Lord Trimleston*.) "Yet in *Smith v.*

Collyer an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the Court, which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But," he adds, "as a condition of such interference, the Court would expect it to be shown that the party applying was proceeding, with all due expedition, to bring the question to a decision;" whereas there that had not been shown.

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The point, I apprehend, to which Vice-Chancellor *Knight Bruce* directs attention, is that Sir *William Grant* does not abnegate the right of the Court to interfere in a case like this. He says, he cannot see why the Court should not interfere, and then he goes on rather to seize upon the special circumstance of the omission on the part of the Plaintiff to show that he was proceeding with all due expedition to bring the question to a decision. That great Judge was very little in the habit of seizing upon slight special circumstances in a case to distinguish it from other cases; but whether it was from feeling unwilling to lay down a principle of such large application, viz. that no interference could under any circumstances take place, or from feeling pressed by the previous authorities, especially that of *Smith v. Collyer*, he leaves the point in that undetermined form. "The Court never had interfered to preserve real property; he did not see, upon principle, why it should not, since it had interfered to protect personal property; but as a condition of such interference, the Plaintiff must show that he has proceeded with all due expedition."

In that case, therefore, although the bill contained a very strong allegation of waste of the most malicious description, that of pulling down houses upon the property

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in question, Sir *W. Grant* refused to interfere, and he gives as his reason, that in his experience he had never known an instance of the Court interfering under such circumstances.

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The reason may be less satisfactory now that we have in a great measure emancipated both our lands and our minds from many conclusions drawn from the feudal law: but many consequences of that law remain, and must remain, until altered by the legislature; and among them, I apprehend, is the great respect which is entertained towards the terre-tenant, as distinguished from the holder of mere personal property, which has led this Court to refuse (except in cases of fraud, or of irreparable mischief, as by mining and the like), to interfere against the alleged title of the person actually in possession.

As regards mere rents and profits of real estate, there is, of course, an obvious reason for not interfering in the manner in which the Court would interfere for the purpose of preserving personal property. In the case of personal property, it is the whole, the corpus, which the Court is called on to preserve; but the rents and profits of real estate are merely the produce de anno in annum, which do not require the same summary interference. As regards waste, that is a case, to a certain extent, affecting the corpus,—and if it be by mining, much more seriously affecting the corpus. Upon that, Vice-Chancellor *Wigram*, in *Davenport v. Davenport* (a), was pressed with a very able argument. I do not find the case in *Molloy* cited before him, but in the face of this decision of Sir *William Grant*, concurring with the observation there made, of there being no good reason why the Court should not interpose with reference to real and personal estate, and concurring with the observation of Vice-Chancellor *Knight Bruce* in *Haigh v. Jaggard*, he

(a) 7 Hare, 217.

refused to interfere; no doubt the case was one of great suspicion, it being a mere fishing bill by a person who had been nineteen years out of possession, and there being many other circumstances unfavourable to the Plaintiff's case.

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The result of the authorities is, that there is no case whatever of such interference. The Judges have declined to say,—and I respectfully beg to follow them in declining to say,—that there may not be a case made out even with reference to real estate, which would be acknowledged by every one to be a case for interference. I do not deny that there may be a possible case in which, while the parties are in litigation on a merely legal title, there may be such utter destruction carried on, such stripping the estate of its timber (to take the cases put by Vice-Chancellor *Knight Bruce*), or pulling down the capital messuage, or such other circumstances, as might justify interference. The dicta only go to such cases; in those dicta I entirely acquiesce; and if such a case should arise, I would not, for one moment, suggest doubts whether so salutary a jurisdiction might not be exercised for the prevention of such malicious acts of spoil, trespass, and injury, while the rights of the parties are in litigation. But, looking at the authorities, I must say that it will require a clear case of that description to be made out, before the Court can be called upon so to interfere.

Upon the face of this bill all I find is, first, the case made as to the rents and profits, which I have dealt with; secondly, that with regard to the alleged loss of rents and profits by the tenants not paying either party, which I have also dealt with; thirdly, the allegation as to the timber,—no specific allegation, but a mere general allegation, that they have cut down a considerable quantity of timber,—that some of it was of an ornamental character, and some of it was not ripe for cutting; that they have sold the same and received the proceeds thereof. There is nothing like that stripping of

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the estate of its timber, nothing like that destruction of the property, which is required before one can interfere; and as to the title of the Plaintiff, I do not say it is like the case of *Davenport v. Davenport*, a mere fishing bill, but the title of the Plaintiff is in a much less favourable position, in many respects, than was the case in *Jones v. Jones*, the title there alleged being that of mere heirship, and the bill charging that the pretended will had been obtained by fraud. In this case the Plaintiff is obliged to state, on the face of his bill—and he states his case perfectly, fairly, and honestly—that in order to make out his title to the property in question, he must make out his title to the Earldom; that for this purpose he must go through a long pedigree, and exhaust the issue of numerous persons descended from an ancestor who died as long ago as the fifteenth century; that the question of his title to the Earldom is actually pending for adjudication before a branch of the legislature, who have, as yet, come to no determination upon it, and who have not, as it appears to me, expressed (although I do not think it would make any material distinction if they had expressed) an opinion in favour of the Plaintiff upon more than two of the three obstacles which he found in his way. In such a case, there being other persons claiming under an adverse title, who have come into possession and are enjoying the rights which the law confers upon those who can obtain the attornment of the tenants and the enjoyment of the estate, I think I should be going very far beyond anything which the Court has hitherto sanctioned, and I should be actually overruling the case of *Jones v. Jones*, if I held that relief could now be given to the Plaintiff.

There is one observation suggested by the ground, upon which Sir *William Grant* seems to prefer resting his decision ultimately in *Jones v. Jones*, viz. the time the Plaintiff had allowed to elapse without proceeding at law.

It is true that in this case Lord *Talbot* has taken a wise, and no doubt a most beneficial course, in attempting at once to establish his claim to the peerage before the House of Lords. At the same time, if he wants such a remedy as is sought by this bill—if he wants with a high hand to stay the receipt of the rents and profits, and the enjoyment of the estates by those upon whom the law confers the enjoyment till they are displaced, I am by no means so clear that his best and most prudent course would not have been to proceed (and it is not contended by counsel that he could not proceed) to recover the estates at law. In that case he would prove the patent of the original Earl, he would next prove his own descent, and that he is the person entitled as Earl; and I apprehend that it would be no answer to him, so proceeding at law, to say that the House of Lords has not yet adjudged that he was entitled to the Earldom. I do not express the slightest opinion, nor have I come to any conclusion, upon the result of the proceedings before the House of Lords. The question I have to consider is, whether he could not have taken proceedings at law before filing his bill, and whether, if he requires the summary remedy prayed by his bill, he ought not to have satisfied this Court that there is an action pending at law between him and the Defendants in possession, which will try the right as between him and them. There is certainly no averment in the bill (it is contrary to the fact, and therefore could not be averred), that any proceeding in a court of law is pending as to the estates in question. Lord *Talbot* is now attempting to establish his right to the peerage in the House of Lords, and he says that will be a step towards establishing his right in the ejectment.

An analogous case has occurred to me which certainly might arise, and I believe has actually arisen—the case of a devise to an executor simply, no executor being named in the will, and then another instrument naming the executor,

1858.
TALBOT
(Earl)
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HOPE SCOTT.
Judgment.

1858.
 TALBOT
 (Earl)
 v.
 HOPE SCOTT.
 Judgment.

and litigation pending in the Ecclesiastical Court to ascertain who is the executor. You would be obliged to go to the Ecclesiastical Court to make yourself out executor; but you are executor before probate, and therefore you could bring your action before the suit in the Ecclesiastical Court was determined in your favour; and I apprehend that if you applied to this Court to protect the real estate pending that suit, this Court would say that an action ought to be brought, and would require to be satisfied that there was *bonâ fide* litigation at law, between you and the parties claiming adversely, to establish your right to the property which you seek to have protected.

I think if it stood on that narrower ground, which I do not rest it on, because the broader grounds are sufficient, there would be considerable difficulty in supporting this bill against the demurrer.

Before leaving the subject of the demurrer I ought to notice that there is another singular token of weakness in the statement of the Plaintiff's title. I commented upon his having that long and difficult title to make out, but in the prayer he prays that the rents of the estates and the proceeds of the timber sold by the Defendants may be secured "for the benefit of the Plaintiff, *or the person or persons who shall be found entitled to the same.*" That is a singular instance of weakness in stating the title.

I come now to the plea. The plea is to that portion of the bill which seeks for a receiver in respect of certain estates vested in the Defendants Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, as trustees for whoever may eventually be shown to be Earl of *Shrewsbury*, and as such entitled under the original Act to those estates. I apprehend it is a good plea. You ask to have certain relief against me, certain accounts of rents and profits, and other relief of

that description, on the ground that you are the heir. You could not maintain the case if you were not the heir. You could not come here as *amicus curiæ*. I plead that you are not heir.

1858.

TALBOT
(Earl)
v.

HOPE SCOTT.

Judgment.

The Plaintiff says, "That is not my equity. My equity is, that the thing is in contest. I aver that I am heir; you say I am not; and whilst the thing is in contest I want to have the property preserved: and to say that I am not heir, is only repeating what I have said in the bill. I have said in the bill that you deny I am heir, and my equity is founded upon there being that contest between us." But if it rests upon that, then all the arguments previously applied to the demurrer apply to the plea. If you profess to rest upon this, that during the contest the Court, simply on the ground of the existence of a contest, will take possession of the property, I apprehend that alone will not do, if the Defendant by way of defence to the whole litigation says, I am prepared to prove, in the progress of this cause, that you have not the slightest interest in the question at issue, and that you are not in a condition to maintain the bill. A negative plea of no heir is admitted to be a good plea in all cases. I apprehend that the reason the plea is not usually put in, that you are not next of kin, when you apply for a receiver *pendente lite* in the Ecclesiastical Court is, that with regard to the question of receivership the thing would be wholly inoperative. It appears to me, that, on replying to the plea, the suit is not out of court,—the suit is in litigation, the Court is master of all the facts, and knows that there is a question to be tried, and with regard to personal estate grants a receiver, if it thinks it right under all the circumstances of the case.

It seems to me that this is a good plea in law to the bill. I cannot conceive any more complete defence to a bill than to say, 'You, the person suing me, asking me to

1858.
 TALBOT
 (Earl)
 v.
 HOPE SCOTT.
 Judgment.

answer and litigate with you certain questions, are an utter stranger and have no interest whatever in the matter.' You may reply to that, 'I shall prove the contrary;' there will then be a contest, and an interlocutory application may be made during that contest.

With regard to the plea being overruled by the voluntary answer, I do not think I can hold that to be the case, since it is an answer in support of the plea. If the answer discovered anything which these Defendants refuse to discover, that would be an overruling of the plea; here, I apprehend, there is no overruling of the plea.

That was the only objection urged to the form. I am bound to say that I have not looked carefully into the form myself, but I have taken it for granted that the counsel have done so, and have found no other objection to be made.

I must allow both the demurrer and the plea; but I give leave to amend as to the plea. As to the demurrer, if any bonâ fide case can be raised about the timber, it would be a proper case to amend (a).

*Minute of
 Decree.*

DEMURRER allowed: Plea also allowed, but with liberty to amend so much of the bill as was covered by the plea.

(a) The Plaintiff's counsel said bill could be amended in this they could not suggest that the respect.

1858.

IN THE SAME CAUSE.

Feb. 2nd.

MR. *Rolt*, Q. C., and Mr. *Shapter*, Q. C., now moved for a receiver of all the estates comprised in the Acts 43 Geo. 3, and 6 & 7 Vict., or either of them, except such as had been sold pursuant to those Acts.

Jurisdiction—Receiver—Order for, against Trustee—Conflicting Trusts.

They rested their application upon the ground that the Defendants being trustees under those Acts, for whoever should eventually establish his claim to the Earldom, had given notice to the tenants to pay the rents to themselves, not in that character, not as trustees, impartially, for the claimant who should be adjudged entitled under those Acts, but as trustees for a particular claimant, Lord *Edmund Howard*, claiming under the will of the late Earl. They were not holding, nor did they profess to hold, an even hand; and on that ground, notwithstanding their high character, the Plaintiff mistrusted them.

Where by Act of Parliament lands were vested in trustees upon trust for sale, and subject thereto upon trusts annexing the rents inalienably to the earldom of *Shrewsbury*, and the last earl attempted to disentail and devise the property annexed to the earldom to the same trustees upon trust for a particular claimant, and the trustees accepted that trust, and claimed to receive the rents in that character, pending proceedings by the Plaintiff to establish his claim to the earldom,—a receiver was ordered of the estates (if any) vested in the trustees, of which the tenants were

Mr. *James*, Q. C., Mr. *Cairns*, Q. C., and Mr. *C. Hall*, for the Defendants, the trustees, opposed the motion, citing *Bainbrigge v. Baddeley* (a).

At the same time they offered to give an undertaking on behalf of the Defendants to account for the rents received and to be received by them.

Mr. *Rolt*, Q. C., in reply.—A simple undertaking, as proposed, to account for the rents would not meet the case.

not paying rent to them; and the Defendants were put upon an undertaking as to the rest, upon the ground that the trusts they had accepted under the will were in conflict with the prior trusts upon which they held the estates.

(a) 13 Beav. 355; S.C., 3 M'N. & Gor. 413.

1858.

TALBOT
(Earl)

v.

HOPE SCOTT.

Argument.

There should be a further undertaking, not in any way to deal with the estates otherwise than in accordance with the trusts of the Acts under which they are held by the Defendants. If such an undertaking be withheld, the Plaintiff is entitled to a receiver as to the whole of the estates to which the motion extends. And in any case there should be a receiver as to all such of the estates as are in the possession of tenants who are not paying rents to the Defendants.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This is not by any means the ordinary case of a person who claims an adverse interest having the legal estate cast upon him. Here the trustees, Mr. *Hope Scott* and Mr. Serjeant *Bellasis*, had the legal estate before the decease of the late Earl. That is perfectly clear upon the Acts 43 Geo. 3, and 6 & 7 Vict. The estates are vested in the trustees in fee, upon the trusts declared by those Acts. That being so, it is not the case of a person who claims a beneficial or adverse interest, having the legal estate afterwards cast upon him; but it is this:—Two persons, being trustees for the rightful Earl of *Shrewsbury*, have chosen to accept another trust, which makes it their business and (as they may conceive) their duty to avoid discovering that person,—in other words, to avoid the very duty which it was incumbent upon them under their original trust to discharge.

The only difficulty I find is this:—If Lord *Talbot* had come nearer to establishing his title, I should have felt very little hesitation in appointing a receiver over all the estates to which this motion extends. But he has not yet established his title. There are difficulties in the way of his establishing it. He states very fairly what those diffi-

culties are. And having regard to his position in that respect, it seems to me that if the trustees are accumulating the rents, of which they are in the receipt, the right course will be, as to the estates of which they are in receipt of the rents, to be content, until the hearing, with an undertaking on their part not in any way to dispose of the rents and profits without the leave of the Court. As to the rest (if any) there should be an inquiry and a receiver, but with liberty for the trustees to propose themselves, because it may be advantageous that all should be received by the same hand.

1858.
TALBOT
(Earl)
v.
HOPE SCOTT.
Judgment.

Having regard to the infirmity of the Plaintiff's title, that is as far as I ought to interfere.

The Plaintiff should give a similar undertaking as to what he may have received.

THE Defendants *Hope Scott* and *Bellasis* undertaking, as to the estates comprised in the Acts 43 Geo. 3 and 6 & 7 Vict., or either of them, except such as have been sold pursuant to those Acts, not to deal with the net rents, after deducting the expenses of management and the charges created prior to the decease of the late Earl, without leave of the Court, otherwise than by investing and accumulating the same in their joint names until the hearing, and the Plaintiff undertaking in the same way, let there be an inquiry at chambers whether any and which of such estates are or is now in the possession of tenants who are not now paying rents to the said Defendants; and appoint a receiver of such estates, if any, with liberty for the said Defendants to propose themselves.

*Minute of
Order.*

1857.

Dec. 12th ;
1858.Jan. 19th &
29th.

*Infant—Loans
to, by Army
Agent—Pro-
ceeds of Sale of
Commission—
Lien upon, for
Money ad-
vanced.*

Army agents advancing reasonable sums of money to a minor, on the assurance that he required them for regimental purposes—*Held*, in the absence of fraud, entitled to a lien for the amount upon the proceeds of the sale of his commission, the agent not being fixed with notice of any impropriety in the sale, or other mala fides in the transaction.

*Powers—
Maintenance &
Advancement—
Purchase of
Commission—
Subsequent Sale
—Right to Pro-
ceeds—Fraud
on Power—
Trustees.*

LAWRIE v. BANKES.

IN the year 1853, Mr. *Bankes*, then a minor aged seventeen, applied to the trustees of his grandfather's will to purchase for him a commission in the army; and for that purpose, and for the purpose of his outfit, to raise a sufficient sum of money by a sale of a portion of a trust fund in which he had a contingent interest in the event of his surviving his father, and out of which the trustees had a power, in the usual form, to raise money for his maintenance and advancement in life. The trustees consented; raised 1,300*l.* by sale of a portion of the trust fund; expended 840*l.* in the purchase of a commission in a regiment then stationed in *Ireland*, and the remainder in providing his outfit. The commission was purchased on the 15th of October, 1853.

In January, 1854, Mr. *Bankes*, being still a minor, sold his commission, and the purchase money (840*l.*) was paid to the Plaintiff, the agent in *England* of the regiment.

Conflicting claims to the purchase money were set up; first, by Mr. *Bankes*, who brought an action against the Plaintiffs; secondly, by the Defendants, the *Canes*, the agents in *Ireland* of the regiment, who claimed a charge thereon for various sums of money, amounting to 140*l.* 14*s.* 2*d.* advanced by them to Mr. *Bankes*; and thirdly, by the trustees, who insisted that the purchase money in question was still subject to the trusts of the will. Under these cir-

Proceeds of the sale by an infant of his commission in the army, purchased three months previously at his request by his trustees, under a power to raise money for his maintenance and advancement out of a fund in which he had only a contingent interest—*Held*, in the absence of fraud, to belong to the infant, although the trustees' object in exercising the power had failed ab initio.

cumstances, the Plaintiff filed a bill of interpleader, and for an injunction, which was granted ; and, pursuant to an order in the cause, the fund was paid into court.

1857.
 LAWRIE
 v.
 BANKES.
 Statement.

Two petitions were then presented in the cause, the one by the *Canes*, for payment of the 140*l.* 14*s.* 2*d.*, the other by Mr. *Bankes*, who had attained twenty-one, for payment of the balance of the fund in court, now reduced by payment of the costs of the suit to 642*l.* 0*s.* 11*d.* Consols, and 49*l.* 4*s.* 1*d.* cash.

The *Canes*, by an affidavit in support of their petition, stated the circumstances under which the debt to them was contracted. They deposed that it was the custom of the *Irish* agents of regiments stationed in *Ireland* to cash the drafts of the officers on the *English* agent of the regiment, and the sums which so became due from the officers of the local agents were considered as regimental debts ; that accordingly, in December 1853, they had cashed four drafts of the Defendant *Bankes* for sums amounting to 160*l.*, part of which the Defendant informed them he required to purchase horses to take with him to join his regiment, and the rest 30*l.* to enable him to join his regiment at *Dundalk* ; that, under Her Majesty's orders and regulations for the army, regimental agents are entitled to deduct from the money in their hands belonging to any officer of the regiment the amount due from such officer for regimental stoppages and debts, whether such officer is or is not a minor, and without any necessity for his consent or concurrence ; and that the sums which, under the circumstances aforesaid, were due to them from *Bankes* for regimental stoppages and debts, amounted, at the date of the sale of his commission, to 158*l.* 3*s.* 5*d.*, since reduced by credits for his pay as cornet to 150*l.* 14*s.* 2*d.*, the amount now claimed by their petition.

1857.
LAWRIE
v.
BANKES.
—
Statement.

The trustees filed an affidavit in opposition to both petitions, stating that the Defendant *Bankes* had never served, and that transactions had come to their knowledge which led them to believe that he never intended to make the army his profession, but that his real intention was to obtain, by the sale of his commission, money for other purposes. They also stated, that the sums borrowed by the Defendant *Bankes* of the petitioners, the *Canes*, had not been expended by him for the purposes for which he professed to borrow them, but in part in relieving himself from his embarrassments.

Both petitions now came on for hearing.

Dec. 12th.
—
Argument.

Mr. *Willcock*, Q. C., and Mr. *Bromhead*, for the *Canes*, in support of the first petition, contended, that, having regard to the orders and regulations for the army, as deposed to by the petitioners, and to the representations made to them by the Defendant *Bankes*, when he obtained from them the sums in question, those sums had been properly advanced, and the petitioners were entitled to a lien for the amount upon the fund arising from the sale of the commission, whether the residue of that fund belonged to *Bankes*, or was still subject to the trusts of the will.

Mr. *Cairns*, Q. C., and Mr. *H. Stevens*, for the Defendant *Bankes*, if the fund was his, were desirous that the petitioners should be paid.

Mr. *R. R. A. Hawkins*, in the absence of Mr. *Rolt*, Q. C., for the trustees :—

The fund out of which the 1300*l.* had been raised was trust money, in which *Bankes* would have no interest un-

less he survived his father, who was still alive. The money spent in purchasing the commission, which was sold as soon as purchased, had not been required for the purposes for which alone the trustees had a power to raise money. The entire proceeds of the sale ought, therefore, to have been restored to the trust. The sums borrowed by *Bankes* of the petitioners were not expended for the purposes for which he had professed to borrow them, nor could they have been required for such purposes, the trustees having previously expended 460*l.* upon his outfit. That transaction, therefore, as well as the sale and the original purchase of the commission, was what this Court would consider fraudulent, and the claim of the petitioners to a lien would not be allowed.

1857.
LAWRIE
v.
BANKES.
Argument.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question seems to turn on the army regulation proposed to by the petitioners, that a regimental agent is entitled to deduct from money in his hands, belonging to any officer of the regiment, the amount due from the officer for regimental stoppages and debts, whether the officer is or is not a minor, and without any necessity for his consent or concurrence. And it appears to be admitted, that the proceeds of the sale of a commission must pass through the hands of the regimental agent.

Judgment.

In cases like this, the Court must always consider the bona fides of the transaction; and if it appear that an officer, not being of age, has applied to the agent for a reasonable sum for the purchase of a horse, and for another sum, not unreasonable in amount, to enable him to join his regiment, such sums would be properly payable out of the regimental fund.

1857.
 LAWRIE
 v.
 BANKES.
 ———
Judgment.

Here the trustees had placed the minor in the army. The agent could only look to the position he filled in the army; and it appears to me, that, unless the agent can be fixed with notice of any impropriety in the sale of the commission, he is entitled to retain what is due to him for advances, like the present, out of the proceeds of the sale.

The lien, therefore, of the petitioners, the *Canes*, must be established; and, the fund being in court, they are entitled to an order for payment out of the fund of the amount claimed by their petition.

Ordered accordingly.

1858.
 ———
January.
 ———
Statement.

The petition of the Defendant *Bankes* stood over to enable that Defendant to file an affidavit in reply to that of the trustees; and an affidavit was subsequently filed by him, in which he denied the statement of the trustees, "that he had never intended to make the army his profession, and that his real intention was, to obtain by the sale of his commission, money for other purposes;" and deposed in effect as follows: That he was very desirous of obtaining a commission and making the army his profession; that it was in consequence of that desire that he had applied to his trustees to raise the money; that in the letter from the *Horse Guards*, announcing his appointment, he was informed that it was necessary he should report himself to the officer in command, and join the corps on or before the 14th of December; that accordingly, before the 14th December, he proceeded to *Dundalk*, where the regiment was stationed, and reported himself to the officer in command of the regiment, and explained to him that he had several matters to arrange and settle before he could enter upon his duties, and obtained leave of absence for that purpose for two months; that the matters which he so required time to adjust were certain pecuniary liabilities which he had incurred in

London, and in respect of which he was at that time being sued in the courts of law in *Dublin*, and for which, as he had not then the means of payment, there appeared a probability of his being arrested; that just previously to the expiration of the two months leave of absence he again reported himself to the commanding officer, and applied for further leave, when he was told it was impossible to grant him any further leave, and if he absented himself without leave, his commission would become forfeited; that under these circumstances, and knowing he should certainly be arrested, he was advised to and did send in the necessary application to have his commission sold, and the same was sold accordingly; and that shortly afterwards he was arrested and lodged in prison, at *Dublin*. He further deposed, that the fact of his being in pecuniary embarrassments at the time when his commission was purchased, was well known to his trustees, he having frequently consulted Mr. *Lloyd* (the partner of one of the trustees in a firm employed by the trustees as their solicitors,) upon the subject of such liabilities; that it was his intention to make the army his profession, and to have continued in the regiment, and the only reason for his selling out was to avoid a forfeiture of his commission, which he understood would be the consequence if he were arrested.

1858.
LAWRIE
v.
BANKES.
Statement.

—

This petition, now coming on again for hearing, Mr. *Cairns*, Q.C., and Mr. *H. Stevens*, for the petitioner, contended, that, upon the affidavits, the petitioner must be taken to have procured the advancement from his trustees bonâ fide, and with the intention of remaining in the army; and as the trustees knew of his embarrassment when the purchase was made, the suggestion of fraud fell to the ground. Then, the purchase having been actually made, and the petitioner having joined his regiment, the commission became his absolute property.

Jan. 19th.
Argument.

1858.
 LAWRIE
 v.
 BANKES.
 —
Argument.

The VICE-CHANCELLOR.—The cases on apprenticeship are somewhat analogous; but in those cases the apprenticeship had actually commenced, and taken effect to a certain extent, and had only terminated by some accident. Here the peculiarity is, that you have failed of your purpose *ab initio*

Mr. Cairns, Q. C.—The moment the trustees exercised their power to advance the money, it was as if they had revoked the trusts of the will *pro tanto*; they ceased to have any control over the money advanced. In all these cases, the only test is, was there fraud? were the trustees kept in ignorance of facts material for them to know, and which had they known, they would not have advanced the money?

[They cited *Leche v. Lord Kilmorey* (a), and *Hirst v. Tolson* (b)].

The VICE-CHANCELLOR.—Suppose this had been like *Leche v. Lord Kilmorey*, and the infant had been prevented by ill health from entering the army?

Mr. Cairns, Q. C.—Then I admit the money must have gone back to the trustees; but here the commission was actually bought, and became the infant's absolutely.

Mr. Hawkins, in the absence of Mr. Rolt, Q. C., for the trustees, contended, that, the trustees having been induced to purchase the commission, by statements and representations which had not been borne out in fact, and which amounted to what this Court considers fraud,—the commission having been sold almost immediately afterwards, and before the petitioner had remained a day with his regiment,—the purpose of the advance having failed *ab initio*,

(a) Turn. & Russ. 207.

(b) 16 Sim. 620; S. C., affirmed on appeal, 2 M'N. & Gord. 134.

and that failure being attributable solely to the acts of the petitioner himself, the whole transaction was a fraud upon the power; and the money having come back into the control of the Court, the trustees were bound to claim it. The petitioner did not even depose that he had joined, only that he had reported himself.

1858.
LAWRIE
v.
BANKES.
—
Argument.

Mr. Cairns, Q. C., replied.

The VICE-CHANCELLOR.—Am I to assume that the trustees knew of his debts when they made the purchase?

Mr. Hawkins.—They certainly knew of his debts, and that he was in difficulties. But they did not foresee he would do as he has done.

The VICE-CHANCELLOR.—If they knew of his debts, I must assume them to have known, that, by the rules of the army, he could not remain in the army with those debts undischarged. I do not see, therefore, that I can deal with it as a question of fraud. As to the rest, I shall look into the authorities, especially those upon apprenticeship.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Jan. 29th.
—
Judgment.

The question raised by this petition is, whether the trustees, who had a power of advancement in favour of the petitioner, having exercised that power by purchasing for him a commission in the army, any portion of the proceeds of the sale, which took place very shortly after the commission was purchased, ought now, under the circumstances that have occurred, to be returned to the trust.

1858.

LAWRIE

v.

BANKES.

Judgment.

The circumstances are shortly these :—The young man was deeply in debt at the time of the purchase. A question was raised, whether there had not been fraud on his part in applying to his trustees to purchase the commission, with the view and object of afterwards selling it and obtaining, partly for himself and partly for his creditors, the benefit of the proceeds of the sale. I think that suggestion was entirely displaced ; because it appears that the fact of the embarrassment which ultimately occasioned his being compelled, almost immediately, to dispose of his commission, was communicated by the minor to a gentleman who is the solicitor and partner of one of the trustees. It is not disputed that the fact of his embarrassment was known to the trustees ; and the obstacle which occurred, whether insurmountable or not, being known to them when the purchase was made, they, being acquainted with all the facts, had an opportunity of exercising their discretion. I do not see anything which occasioned the sale except the fact of the young man's embarrassment. And I do not think that there was any predetermination on his part to obtain the commission for the mere purpose of selling it.

The purchase being made, he is directed to join his regiment. He does join it—for he reports himself, and, so far as I can learn from those who are informed on the subject, reporting himself and obtaining leave of absence from his commanding officer, is unquestionably joining. Having joined, he obtains leave of absence for two months, in the hope, if possible, of settling these debts. In this he failed ; the debts could not be settled ; and the result was, that, without communicating with the trustees upon the subject, the commission was sold, and the money received by his army agent.

He had previously obtained advances from his army agent for the alleged purpose of purchasing his outfit. It

does not appear that he made that purchase. But I do not think that I can look on that as evidence of fraud existing at the time when the commission was purchased. Finding his debts were greatly pressing, he could not effect the object he had in view; and some portion of the money advanced by the army agent seems to have been applied towards relieving himself from his embarrassments.

1858
LAWRIE
v.
BANKES.
—
Judgment.

With regard to the money so advanced by the army agent, I held that the latter had a lien, and was entitled to payment of the amount out of the proceeds of the commission, which reduced the fund in court to a comparatively small sum. The petitioner now asks that the costs of all parties when taxed may be paid out of that fund, and the balance transferred into his own name.

In reserving judgment, I was anxious to examine the authorities with reference to apprenticeship, and I have now done so. Some of those cases appear to have been brought before the Court in a singular form. There seems to have been, in the minds of the parties applying to recover the premiums, a degree of uncertainty as to whether the infant, or the parent or other person making the advance, was the party entitled to what might be recovered. In some instances the father and the infant joined in making the application. In *Hirst v. Tolson* (a), which came afterwards before Lord *Cottenham* (b), the mother, who had advanced the money joined with the infant as Co-plaintiff, showing evidently that there was some uncertainty as to the exact position and rights of the Plaintiffs inter se. But I find no specific authority upon the subject.

Under these circumstances, looking to the whole of the transaction, the commission having been actually purchased,

(a) 16 Sim. 620.

(b) 2 M. & G. 134.

1858.
 LAWRIE
 v.
 BANKES.
 ———
Judgment.

the young man having actually joined his regiment, and there being no fraud in what has occurred, it appears to me that, in the absence of any direct authority to the contrary, I must hold the subsequent sale to have been for his benefit. Had the sale been occasioned by sickness or any other cause after two or three months' service, that would clearly have been the result; and although unfortunately, in the events that have occurred, the whole benefit intended to be derived from the exercise of the power has failed, yet, the purchase having been made and the commission vested in the young man, I think it would be too much to hold, in the absence of fraud, that the proceeds are not to be dealt with as his property. I find no authority precisely in point; but, upon principle, the commission having once become his, and fraud not being proved, the proceeds must be taken to be his also.

The result is, that there must be an order according to the prayer of the petition.

Ordered accordingly. One order upon both petitions.

SOAR v. FOSTER.

Jan. 23rd &
 28th.

*Advancement or
 Provision—De-
 ceased Wife's
 Sister—Mar-
 riage with, since
 5 & 6 Will. 4, c. 54—Purchase of Stock in joint Names—Presumption—Resulting Trust for Pur-
 chaser.*

IN the year 1840, *William Harris*, deceased, the testator in the cause, married the Defendant *Rachel*, his deceased.

*5 & 6 Will. 4, c. 54—Purchase of Stock in joint Names—Presumption—Resulting Trust for Pur-
 chaser.*

Purchase of stock in the names of the purchaser and his deceased wife's sister, whom (in form) he had married since the Act 5 & 6 Will. 4, c. 54 and always treated as his wife—*Held*, not to raise a presumption that it was intended as an advancement or provision for her.

The authorities have established that this presumption will arise where a purchase is made in the name of a wife, a legitimate child, or a grandchild whose father is dead; and also, as it would seem, upon a purchase made in the name of an illegitimate child.

Observations on *Beekford v. Beekford*, Loft, 490.

wife's sister (*a*), and afterwards purchased 650*l.* Consols in the joint names of himself and the Defendant as "*Rachel Harris*, his wife."

1858.
SOAR
v.
FOSTER.
Statement.

By his will, in 1845, the testator bequeathed to the Defendant *Rachel*, in the will described as "his wife *Rachel Harris*" (*inter alia*), the interest of all the money he had in the public funds, for her life; and "at the death of his said wife," he bequeathed all the principal sums of money in the said public funds to the Plaintiff *Mary Jane Soar*, his daughter by his former marriage, and he appointed "his said wife *Rachel Harris*" sole executrix of his will.

At the time of his death (31st January, 1845), the testator was possessed of the 650*l.* Consols standing in the joint names of himself and the Defendant *Rachel*, and of 50*l.* Consols standing in his own name.

After the testator's death, *Rachel* married the Defendant *William Foster*.

The bill was filed by *Soar* and *Mary Jane* his wife against *Foster* and *Rachel* his wife; and it prayed that it might be declared that the 650*l.* Consols, as well as the 50*l.* Consols, formed part of the estate of the testator *Harris* at the time of his death; and that the Plaintiff *Mary Jane* was entitled thereto after the death of the Defendant *Rachel*; and that the Defendants might be decreed to replace the 650*l.* Consols (which they had sold); and for other consequential relief.

(*a*) Lord *Lyndhurst's* Act, 5 & 6 Will. 4, c. 54), by which it was enacted "that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or

affinity should be absolutely null and void to all intents and purposes whatsoever," received the Royal assent on the 31st of August, 1835.

1858.
 SOAR
 v.
 FOSTER.
 —
Statement.

The bill admitted that the testator and the Defendant *Rachel*, after going through the form of marriage, cohabited together, and treated one another, and were regarded generally by others, as man and wife.

Evidence was adduced by the Defendants, but unsuccessfully, to show that the 650*l.* Consols were purchased with *Rachel's* savings; but the Court was of opinion that they were purchased with the testator's own moneys.

Argument.
 —

Mr. *Rolt*, Q. C., and Mr. *J. H. Law*, for the Plaintiffs, contended that they were entitled to a decree as prayed.

They relied upon the general rule, that where a purchase is made by one in the name of another, or in the name of himself and another, the latter is a trustee for the purchaser. The case of a wife was exceptional; and had the Defendant *Rachel Foster* been the lawful wife of *Harris* at the time when this stock was purchased, a presumption might have arisen that it was intended as a provision or advancement for her quâ wife. But she was not his lawful wife. The marriage, if marriage it could be called, was in 1840, long after the passing of Lord *Lyndhurst's* Act (a), and at a time when he must have known that the marriage was simply void. Legally, therefore, although of course not morally, the case was the same as *Rider v. Kidder* (b), where the purchase was made in the name of the purchaser and a woman with whom he cohabited, and in such a case the law is clear that the presumption does not arise: *Freeman v. Tatham* (c); according to the principle of *Ex parte Pye* (d), which in this respect was analogous, the question is, whether there is a legal, not whether there is a moral, obligation to make the provision or advancement.

(a) 5 & 6 Will. 4, c. 54.
 (b) 10 Ves. 360.

(c) 5 Hare, 329.
 (d) 18 Ves. 140.

But, assuming the presumption to arise, it was a presumption capable of being rebutted by evidence of intention contemporaneous with the purchase: *Murless v. Franklin* (a), *Benbow v. Townsend* (b); and upon the evidence in the cause, the presumption, if any, was rebutted.

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Argument.

[They cited also *Deacon v. Colquhoun* (c).]

Mr. Cairns, Q. C., and Mr. N. Joseph, for the Defendants:

In *Rider v. Kidder* (d), the purchase was made by a married man in the names of himself and of a woman with whom he was living in adultery. Here it was admitted by the bill that the parties "treated one another and were regarded generally by others as man and wife." In such marriages immorality was out of the question, and neither *Rider v. Kidder* nor *Freeman v. Tatham* (e) could apply.

The general rule, that on a purchase by one man in the name of another the nominee is a trustee for the purchaser, is subject to exception "where the purchaser" (to use the words of Lord Eldon) "is under a species of natural obligation to provide for the nominee." Where that is so, the purchase is, *prima facie*, a provision for the latter, and it is necessary to repel that presumption by evidence which shows that, at the time, the purchaser intended the purchase for his own benefit: Per Lord Eldon, in *Murless v. Franklin* (f). Legal relationship is not necessary in the case of children; nor is it in cases like the present: it is sufficient if there be recognition and treatment of the parties as occupying the supposed relationship.

The VICE-CHANCELLOR.—That doctrine would include a case of mere cohabitation.

(a) 1 Swanst. 13.

(b) 1 M. & K. 506.

(c) 2 Drew. 21.

(d) 10 Ves. 360.

(e) 5 Harc, 337.

(f) 1 Swanst. 17.

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 v.
 FOSTER.
 —
Argument.

Mr. *Cairns*, Q. C.—We confine ourselves to the case before the Court; and we say the Court cannot distinguish such a case from that of an illegitimate child clearly recognised as a child by the party making the advancement. The bill says these parties treated one another as husband and wife. In Lord *Eldon's* words, the purchaser was under “a species of natural obligation to provide for the nominee.”

[They then proceeded to argue, that, assuming the presumption to have arisen, it was not rebutted by any of the facts in evidence; and they further contended, that, even if there were no such presumption, the evidence showed that the stock in question was intended by the purchaser as a provision for the Defendant.]

A reply was not heard.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating the facts, and showing that it was impossible to contend that the money with which the stock was purchased was other than the money of *William Harris*), proceeded as follows:—

The first question, therefore, is whether a purchase in the name of the purchaser and of a woman whom, in form, he has gone through the ceremony of marrying, but who, as he must be taken to have known, could never become his lawful wife, raises such a presumption that the purchase was intended by him as a provision for her in the event of her surviving, as to throw the onus of proof upon those who assert a contrary intention.

It was contended, on the part of the Defendants, that the question was independent of legal relationship, or legal

obligation to provide for the party in whose name the purchase is made; and that, in the absence of any such relationship or obligation, if there were merely a moral obligation—or such facts as led up to the conclusion that the purchaser had a moral duty incumbent upon him—to provide for the party in question, that circumstance alone would be sufficient to raise a presumption that the purchase was intended as a provision, and would throw upon the Plaintiffs the onus of rebutting that presumption.

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The rule which raises a presumption of this nature upon a purchase by a father in the name of a child would seem to have been extended, in a case imperfectly reported in *Lofft's Reports*—that of *Beckford v. Beckford* (a),—to a purchase in the name of an illegitimate child; and I find a reference made to the same principle in a case which came before Lord Justice *Knight Bruce*, when Vice-Chancellor, that of *Currant v. Jago* (b), where the parties were in the relation of aunt and nephew. There it was admitted on behalf of the aunt, who was the Plaintiff, that she and her late husband had maintained and educated the nephew, and had intended to provide for his advancement; but she contended, that the presumption which arises in favour of a child, in the case of a purchase by a father in his child's name, did not arise where the party purchasing is only in loco parentis. The Defendants, the representatives of the infant, contended that the presumption did arise in cases of adopted parentage, and cited a case where bonds purchased by a grandfather in the name of his infant grandchildren, whose father was dead, were decided to be provisions for the grandchildren and not subject to a resulting trust for the purchaser (c). But the Vice-Chancellor observed upon that, "There the father was dead. Is there any case of grandfather, father and son, the father alive?" And it is

(a) *Lofft*, 490. (b) 1 Coll. 261. (c) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

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 ———
Judgment.

clear from his judgment, that, although taking all the circumstances of that case together the learned Judge was of opinion that the property formed part of the nephew's estate, he did not so decide upon the mere ground of its being a case of adopted parentage.

The result, therefore, thus far, is, that the presumption in favour of a provision or advancement arises in the case of a purchase by a father in the name of his child; that it has been extended in the one instance I have mentioned—the case in *Lofft*, to which I shall again refer presently,—to a purchase in the name of an illegitimate child; and that it has also been held to arise where there has been a purchase by a grandfather in the name of a grandchild whose father is dead.

It has also been held to arise where there has been a purchase by a husband in the name of his wife. But as to cases of that class the authorities are very few. In one, *Kingdon v. Bridges (a)*, I find it put upon a somewhat different ground from that on which it is put in the case of a child or grandchild; and for that reason I shall examine the latter ground in the first instance.

In *Grey v. Grey (b)*, Lord *Nottingham* makes some observations which have a material bearing upon the ground of the presumption in the case of a purchase in the name of a child. He says, "Generally and *primâ facie*, a purchase in the name of a stranger is a trust [for the purchaser] for want of a consideration; but a purchase in the name of a son is no trust, for the consideration is apparent. But yet it may be a trust if it be so declared," in the manner which he mentions. Then, after stating that in the case before him the declarations were conflicting, and could not

(a) 2 Vern. 67.

(b) Reported from Lord *Not-*

tingham's MSS., 2 Swanst. App. 597; *S. C.*, 1 Ch. Ca. 296.

be relied on, he says, "Ergo, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. And herein the great question is, whether the law will admit of any constructive trust at all between father and son. For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and ergo, the father who would check and control the appearance of nature, ought to provide for himself by some instrument or some clear proof of a declaration of trust, and not depend upon any implication of law; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions. The wisdom of the common law did so, for all the books are agreed on this point, that a feoffment to a stranger without a consideration raised a use to the feoffor; but a feoffment to the son without other consideration raised no use by implication to the father, for the consideration of blood settled the use in the son, and made it an advancement. How can this Court justify itself to the world if it should be so arbitrary as to make the law of trusts to differ from the law of uses in the same case?"

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FOSTER.
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It is clear, therefore, that Lord *Nottingham* thought there was a considerable analogy between the principle upon which this Court presumes a purchase in the name of a son to have been intended as an advancement for the son, and the doctrine of the common law in regard to uses; and that, as upon a feoffment by a father to his son without other consideration, the consideration of blood settled the use in the son, and made it an advancement, preventing a resulting use by implication to the father; so upon a purchase by a father in the name of his son, this Court would presume an advancement to have been intended and would not imply a resulting trust for the father.

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How the doctrine came to be extended to the case of illegitimate children is not clear, for the report of the case in *Lofft* is excessively confused, and all that is given of the judgment is this:—"Note—As I understand, the Lord Chancellor decreed that the son took to his own benefit, and not in trust." And I find no other authority throwing any light upon the principle on which it was so extended.

Then, as to the case of a wife, and the principle upon which the Court presumes, that, where there is a purchase in the joint names of husband and wife, the purchase is *primâ facie* to be taken as a provision for the wife: in the case of *Kingdon v. Bridges* (a), it is put upon the ground that the wife cannot be a trustee for her husband, and therefore it shall be presumed, *primâ facie*, to have been intended for the wife's own benefit.

In a note to that case, I find a reference to some others; and in one other case I find it put upon the ground of natural affection, in another upon the same ground on which *Kingdon v. Bridges* was decided, viz. that the wife cannot be a trustee for her husband. But I find very little other authority as to the doctrine which raises this presumption in favour of a wife.

Upon the whole, therefore, the result of the authorities is this:—the rule which raises a presumption, that a purchase in the name of another was intended as an advancement or provision for the latter, so as to preclude a resulting trust from arising for the purchaser until that presumption has been rebutted, is applicable where the purchase was made in the name of a legitimate or illegitimate child, or in the name of a grandchild whose father is dead, or in the name of the wife of the purchaser. In all these

(a) 2 Vern. 67.

cases the rule is definite and clear, that the purchase is *prima facie* to be taken as a provision or advancement for the person in whose name the purchase has been made.

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v.

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Judgment.

But when I come to the case now before me, how does the matter stand? I have here the case of a man who must be taken to have known the law, that no man could contract a valid marriage with a sister of his deceased wife. The act forbidding such marriages had been passed several years previously, and the question had been so much discussed in public that he must not only be presumed to have known, but, as a fact, he could not possibly have been ignorant of, the law in reference to such marriages. Knowing that, he contracts a marriage with the Defendant who was his deceased wife's sister, and afterwards purchases this stock in their joint names. Then how does the inference arise that the purchase was intended as a provision for the Defendant? Not upon the ground of his being under a moral obligation to provide for the Defendant, for that argument would be equally applicable, if, instead of an invalid marriage of this description, the case had been one of bigamy by a person representing himself to be unmarried. In such a case there would be a clear moral duty incumbent upon the person supposed, to provide for a woman whom he had so grossly deceived. The same argument would apply to a case of mere cohabitation without any form of marriage whatever. Any moralist would say, that a man was bound to make provision for the woman with whom he had so cohabited. But it would be impossible for this Court to hold, if in either of the cases supposed an investment had been made by the man in the names of himself and the woman, that, upon the mere ground of his being under such moral obligation, the purchase could be presumed to have been intended by him as a provision of advancement.

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 v.
 FOSTER.
 Judgment.

The law has confined the rule as to a presumption of this description, to certain clear and definite propositions which are easily understood; and I should be opening a very wide field if I were to hold that the mere circumstance of the ceremony of marriage having been gone through between persons who must have known that they were incapable of contracting a valid marriage, raises such a presumption as to the intention with which a purchase of this description was made, as to throw the onus of proof upon those who rely upon the ordinary rule in such cases, viz. that there is a resulting trust for the purchaser.

Various motives might be suggested as leading to a purchase of this description; and there is no necessity to resort to the supposition that it was intended as an advancement.

That being so, the onus of proof is with the Defendants, to show that the purchase was intended as they contend it to have been.

[His Honour then examined the evidence, and held that it did not make out the Defendants' case in this respect.]

The Plaintiffs, therefore, are entitled to a decree (a).

Minute of
 Decree.

DECLARE that the £650 Consols in the pleadings mentioned belonged to and formed part of the estate of the testator *William Harris* at the time of his death, and that the Plaintiff *Mary Jane Soar* is entitled thereto in reversion, after the death of the Defendant *Rachel Foster*; and declare that the Defendant *William Foster* is bound to make good the said sum of £650 Consols.

ORDER the Defendant to transfer the same into court within three calendar months.

(a) See further, as to children, Bright's "Husband and Wife," 1 Ch. Ca. 28, 296; 2 Id. 232; and as to a wife, the cases collected in vol. 1, p. 32.

1858.

CHAPPELL v. HAYNES.

A SPECIAL case.

James Jeseeph was a freeman of the city of *London*, and was possessed of three undivided fourth-parts of certain leasehold property, held for a term of years, to expire in 1877; and by his will, in 1843, he bequeathed all his leasehold property to his wife *Eleanor*, for her sole use during her life.

The testator died in the same year without issue, leaving *Eleanor Jeseeph*, his widow, and the Defendants his two sisters and sole next of kin.

No executor having been named in the will, letters of administration with the will annexed were granted to the widow, who died in 1854, having by her will appointed the Plaintiff her executor, who proved her will. Since her death, administration de bonis non with the will of *James Jeseeph* was granted to one of the Defendants.

The special case stated, that, according to the custom of the city of *London*, the personal estate of an intestate freeman dying leaving a widow and no child, was, at the respective times of the deaths of *James Jeseeph* and *Eleanor* his wife, distributable as follows, namely—one half to the widow, and the other half to the administrator, to be disposed of according to the Statutes of Distribution.

The question for the opinion of the Court was, whether, under the circumstances above stated, the remainder expectant upon the life estate of the widow in the three equal

Feb. 19th &
20th.

Will—Freeman of City of London—Custom—Statutes of Distribution—Remainder expectant on Life Interest—Stat. 11 Geo. 1, c. 18.

If a freeman of the City of London dies leaving a will, but without having appointed an executor, so much of his personal estate as he has not disposed of by his will must be distributed according to the custom of London, and not according to the Statutes of Distribution.

Bequest of leaseholds by a freeman of London to his wife for life, and no executor appointed—Held, that the residue of the term was distributable according to the custom, and not according to the Statutes of Distribution.

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undivided fourth-parts of the leasehold premises became distributable according to the custom of the city of *London*, or according to the Statutes of Distribution.

Argument.

Mr. *Renshaw*, for the Plaintiff, contended that the remainder in question was distributable according to the custom. Quoad the remainder, the testator had not exercised his statutory power under 11 Geo. 1, c. 18, s. 17. He had not even appointed an executor as in *Pickford v. Brown (a)*. As to the remainder, therefore, he had in effect died intestate, and the custom applied.

The customs of *London* and *York* do not require absolute or complete intestacy; but where there is a partial will and no executor is appointed, the residue is subject to the custom: *Wheeler v. Sheer (b)*.

Feb. 20th.

Mr. *Bristow*, for the Defendants, contended that the remainder was distributable according to the Statutes of Distribution, and not according to the custom. The test is this—Is there in the will a disposition of the property in question? If so, the custom is ousted. Here there is such a disposition. The property is bequeathed to the widow during her life, and the disposition of a particular interest in the whole ousts the custom. In *Wheeler v. Sheer*, nothing was done to oust the custom. *Fitzgerald v. Field (c)*, and *Pickford v. Brown (a)*, show that it is not even necessary to dispose of any part of the beneficial interest, the mere appointment of an executor, who takes nothing beneficially, being held sufficient.

[*Walton v. Walton (d)* and *Wilkinson v. Atkinson (e)* were also cited.]

(a) 2 K. & J. 426. (b) Mos. 302; and see Wms. on Executors, 1312.
 (c) 1 Russ. 416. (d) 14 Ves. 324. (e) Turn. & Russ. 255.

A reply was not heard.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have had an opportunity, since this case was opened yesterday, of looking into the authorities upon this subject. I find no direct authority upon the precise point now raised; but upon principle the question is, whether the testator has taken the case out of the custom, by effectually disposing of the property in question. If not, the custom applies.

Judgment.

The authorities have determined, and I have so held in *Pickford v. Brown* (a), that where the testator appoints an executor, the will operates as an effectual disposition of his entire personal property, and the case is taken out of the custom. In this case no executor has been appointed; and although the testator has left a will, by which he has effectually disposed of a partial interest in his leasehold property, it is perfectly clear that the will has not operated upon the remainder of his interest in that property. He does not attempt to make any disposition of the term beyond the life interest given to his widow. He says nothing as to the residue after the determination of that life interest. So far as regards that residue, he has not exercised the power given him by the statute (b), and the interest of which he has not disposed remains subject to the custom.

DECLARE, that the remainder in question is distributable according to the custom of the City of London.

*Minute of
Decree.*

(a) 2 K. & J. 426.

(b) 11 Geo. 1, c. 18.

1858.

Feb. 22nd.

HILL v. WALKER.

*Executor—
Debt due to—
His Right to re-
tain—Statute of
Limitations—
Devastavit—
Mistake of Fact
—Payments
under.*

JAMES WALKER, as executor of his mother *Jane Walker*, the testatrix in this cause, claimed to retain out of her residuary personal estate the sum of 4,800*l.*, being the amount of certain yearly payments erroneously made by him to the testatrix, from February 1829, when she became a widow, until her death in 1854.

An executor is entitled to retain his debt, although barred by the Statute of Limitations during the lifetime of the testator.

The bill, filed by the trustees of the will against *James Walker* and the residuary legatees, prayed inter alia that it might be determined by the Court whether the Defendant *James Walker* was or was not entitled to retain the said sum.

Therefore, where an executor, under a mistake of facts, had made yearly payments to his testatrix for twenty-five years previous to her death, he was held entitled to retain the amount out of her residuary estate.

It appeared in evidence, that the several payments, amounting to the sum in question, had been made by the Defendant to the testatrix under the mistaken impression that a jointure charged by her marriage settlement upon his estates amounted to 800*l.*, whereas, upon her death, he for the first time discovered, as the fact was, that it amounted to 600*l.* only.

Contrary dictum of *Bayley, J.*, in *M'Culloch v. Dawes* (9 Dowl. & Ry. 43), disapproved.

Will—Codicil—Revocation.

Testatrix by her will bequeathed a sum of money to trustees upon trust to accumulate for a period exceeding what the law allows, and to pay and divide the principal sum, interest, and accumulations unto and amongst a certain class, with a power of advancement in favour of sons. By a codicil, after reciting that she had by her will bequeathed this sum upon trust to accumulate, and to pay and divide the same sum and all accumulations thereof in manner therein mentioned, she directed, that, in lieu of the accumulation and disposition made thereof by her will, the trustees should accumulate for twenty-one years after her decease, and should stand possessed of the principal money, interest, and accumulations upon trust for such of the class as should be then living. The codicil did not repeat the power of advancement, but concluded by confirming the will in every particular in which the same was not thereby altered:—*Held*, that the power of advancement was a valid and subsisting power, and was not revoked by the codicil.

Mr. *A. J. Lewis* appeared for the Plaintiffs.

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v.
WALKER
—
Argument.

Mr. *James*, Q. C., and Mr. *Hingeston*, for the Defendant *James Walker*, contended that the payments having been made under a mistake of fact, could clearly be retained, if the case rested there. The only question was, whether, having regard to the Statute of Limitations, the Defendant was barred from retaining such of the payments in question as had been made by him six years previously to the death of the testatrix. It had been expressly decided, that, although a residuary legatee, or other person interested in the fund, may take advantage of the statute before the Master, the executor refusing to interfere (a), yet the executor is not bound to take that course; equity will not compel him to plead the statute to an action by a creditor of the testator for the recovery of a debt barred in the testator's lifetime (b). And in the recent case of *Stahlschmidt v. Lett* (c), V. C. *Stuart* had applied that principle to the right of an executor to retain his own debt, holding that, as an executor may pay a debt justly due to a stranger, although barred by the statute in the testator's lifetime, so he may retain his own just debt under the like circumstances.

[They cited also *Hopkinson v. Leach* (d).]

Mr. *Daniel*, Q. C., and Mr. *Schomberg*, for the residuary legatees, did not deny that the money had been paid under a mistake of fact; nor could they dispute the right of the Defendant to retain the amount paid by him within six

(a) Per Sir *J. Leach*, M. R., in *Shewen v. Vanderhorst*, 1 Russ. & M. 347, affirmed on appeal by Lord Brougham, C., 2 Id. 75.
(b) See *Williams on Executors*, 1535 (4th ed.), and cases there cited.
(c) 1 Sm. & Giff. 415.
(d) 1 Madd. Ch. Practice (3rd ed.) 728.

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 v.
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Argument.

years previous to the decease of the testatrix. But the question was as to the right to recover payments barred by the statute.

The VICE-CHANCELLOR.—Upon that, the case of *Stahlschmidt v. Lett* seems expressly in point.

Mr. Schomberg.—There the statute had barely run. Here it had run for nineteen years. The executor claims to retain payments made twenty-five years before the testatrix's death. The amount claimed is excessive. It was the Defendant's business to ascertain his rights, and the real extent to which his estate was subject, within a reasonable time. The Court must bind parties who thus neglect their own rights. There must be some limit, or there is no knowing where claims of this kind to arrears will stop.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case seems to be governed by the authority of *Stahlschmidt v. Lett*, and I see no sort of reason for doubting the authority of that decision. This Court had decided in previous cases, that an executor is not bound to set up the Statute of Limitations as a defence to claims made by third persons against the testator's estate ; and if he is not bound to take that course in dealing with others, what principle can there be for saying he is to be more rigorous in regard to himself ?

In this particular case, there is no hardship in the claim set up by the executor, nor anything but what in the abstract is perfectly equitable on his part. It was not until after the death of the testatrix that he discovered the facts upon which his claim is founded.

I must therefore hold that he is entitled to retain the amount of his claim.

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v.
WALKER.
Judgment.

Mr. *Daniel*, Q. C., asked permission to call his Honor's attention to the case of *M'Culloch v. Dawes* (a), where Mr. Justice *Bayley* said, that executors were bound to resist a claim that was barred by the statute, adding, "They have no right to waive any legal defence to such an action; and if they did, and were to pay a debt against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property." The observation had been cited in text books (b), and if not law at the present day, it was desirable that it should be expressly disapproved.

The VICE-CHANCELLOR.—It certainly cannot be considered to be law at the present day, that executors, paying a debt against the recovery of which the Statute of Limitations might be pleaded as a legal bar, render themselves liable over to those who are interested in the testator's property. Instances of such payments must very frequently have occurred, and yet I am not aware of any case in which an executor, paying such a debt, has been held to incur any liability.

DECLARE, that the Defendant *James Walker* is entitled to retain the 4,800*l*.

Minute of
Decree.

A further question arose in the same cause as to the effect of a codicil of the testatrix upon a power of advancement given by her will.

Statement
resumed.

(a) 9 Dowl. & Ryl. 43. Jarman's Concise Forms of Wills,
(b) Williams on Executors, (4th ed.) p. 268.
1535 (4th ed.), and Hayes' &

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 —
*Statement
 resumed.*

It appeared, that, by her will in 1836, the testatrix had bequeathed 7,000*l.* to trustees, upon trust to invest the same, together with the interest, dividends, and produce thereof, upon such securities as therein mentioned, during the lives of *Richard Hill* and *Jane* his wife, and the life of the survivor; and after the decease of such survivor, upon trust to pay and divide the said principal sum of 7,000*l.*, and the dividends, interest, and accumulations thereof, unto and amongst all and every the child and children of *Jane Hill* who should be living at the time of the decease of the survivor of *Richard* and *Jane*, and the issue of such of them as should be then dead. Provided always, and the testatrix thereby directed, that it should be lawful for the said trustees, with such consent as therein mentioned, to pay and apply, for the benefit of any of the sons of *Richard* and *Jane*, any sum or sums of money, not exceeding his or their expectant share, for and towards his and their advancement in the world. The will contained directions to accumulate the income, arising from the residuary property of the testatrix for twenty-one years from her death, for the benefit of the children of *James Walker*, but without any power of advancement.

The testatrix afterwards made the following codicil to her will :—"Whereas I have in and by my said will given unto my trustees therein named the sum of 7,000*l.*, upon trust to accumulate the same, and the interest, dividends, and produce thereof, during the lives of *Richard Hill* and my daughter *Jane Hill*, his wife, and the life of the survivor of them, and at the decease of the survivor of them to pay and divide the same sum, and all accumulations thereof, in manner therein mentioned; now I do hereby direct and declare, that, in lieu of the accumulation and disposition made thereof by my said will, the trustees and trustee for the time being of my said will shall accumulate the said sum of 7,000*l.*, and the interest, divi-

dends and produce thereof, in the nature of compound interest, for the term of twenty-one years next after my decease; and at the expiration of the said term, I direct my said trustees to stand possessed of the said sum of 7,000*l.* and the interest, dividends, and produce thereof, and all accumulations thereof, in trust for such of the children of my said daughter *Jane Hill* as shall be living at the expiration of the said term; and the issue then living of such of her children as shall die before the expiration of the said term, as tenants in common." And after directing certain other alterations in her will, not affecting the present question, the testatrix concluded her codicil as follows:—"And I hereby confirm my said will in every particular in which the same is not hereby altered."

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Statement resumed.

The bill prayed that it might be determined whether the power of advancement given by the will to the trustees was a valid and subsisting power, or whether it had been revoked by the codicil.

Mr. *James*, Q. C., and Mr. *Hingeston*, contended that the power of advancement was revoked by the codicil. The disposition made by the codicil was substituted for and superseded the entire disposition made by the will in reference to the 7,000*l.* and accumulations, the words being "in lieu of the accumulation and disposition made thereof by my said will." The codicil cut down the direction for accumulation in the will, from a period exceeding what the law allowed to the legitimate period of twenty-one years from the testatrix's death. The other direction to accumulate for the benefit of *James Walker's* children, originally limited by the will to the like legitimate period, contained no power of advancement; and there was nothing improbable in supposing that the testatrix intended, by her codicil, to place the children of her son, and those of her

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—

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daughter, on the same footing in this respect. But, in fact, it was immaterial to consider what her intention was, as was clear from *Holder v. Howell* (a), where Sir William Grant, M. R., held there was a total revocation, notwithstanding a manifest intention to the contrary. And the same authority showed, that the clause at the end of the codicil confirming the will in other respects did not affect the question; the effect of that clause being to confirm only so much (if any) as was not revoked.

Mr. Roxburgh, for the sons of *Richard* and *Jane*, was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It appears to me that this power of advancement is a subsisting power, and was not revoked by the codicil. In *Holder v. Howell* what Sir W. Grant says in effect is this:—"The testator might have left the disposition of the surplus rents contained in his will untouched; and very probably he meant those rents to be disposed of as he had directed by his will. But he has chosen to revoke his will. It is clear that he had a settled design to revoke, not merely to alter, the whole will; he did revoke it, and took upon himself to declare over again all the trusts, but in so doing he omitted the trusts in question." But here the testatrix has done the very opposite. She has not revoked anything. She has merely altered certain dispositions; and the rest she has confirmed by a clause somewhat more specially worded than the form usually employed for that purpose, although that would have been sufficient, her words being:—"And I hereby confirm my said will in every particular in which the same is not hereby altered."

(a) 8 Ves. 97, 103.

Then, as to the extent of the alterations, she says this :—
 “Whereas I have in my said will given unto my trustees, therein named, the sum of 7,000*l.* upon trust, to accumulate the same, and the interest, dividends, and produce thereof, during the lives of *Richard Hill* and my daughter *Jane Hill* his wife, and the life of the survivor of them, and at the decease of the survivor of them to pay and divide the same sum, and all accumulations thereof, in manner therein mentioned.” So far, clearly, she does not refer to the power of advancement. That is all she means to recite, and then she proceeds thus :—“Now I do hereby direct and declare, that, in lieu of the accumulation and disposition made thereof by my said will, the trustees and trustee for the time being of my said will shall accumulate the said sum of 7,000*l.*, and the interest, dividends, and produce thereof in the nature of compound interest, for the term of 21 years after my decease.” And then she goes on to declare the trusts of those accumulations. It is clear that neither of those clauses touches the power of advancement.

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 Judgment.

The case is open to the observation that was made, that the testatrix intended to place the children of her daughter and those of her son on the same footing, as regards the absence of a power of advancement ; but upon the face of the whole codicil, looking to what the testatrix has recited,—looking to the direction in the operative part of the codicil, and the clause of confirmation at the end,—it may fairly be held that the codicil has not affected the power of advancement.

DECLARE, that the power of advancement is a valid and subsisting power, and has not been revoked by the codicil.

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Cor.
V. C. WOOD
and Barons
BRAMWELL &
WATSON.

1857.

June 2nd.

1858.

Feb. 13th,
22nd, & March
1st.

Settlement—
Construction—
Recital of
Seisin in Fee
—Grant of
Jointure Rent-
charge—Pow-
ers of Distress
& Entry—Term
to secure—
“Grant, bar-
gain, sell, de-
mise, and con-
firm”—Mar-
riage—Repre-
sentations pre-
vious to.

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BY an indenture dated June 1835, and made between *Robert Monypenny* of the first part, *Susannah Monypenny*, then *Susannah Dearden*, spinster, of the second part, *Phillips Monypenny* (the uncle of *Robert*), of the third part, and *Thomas Monypenny* and *Peregrine Dearden* of the fourth part, being the settlement made in contemplation of the marriage shortly afterwards solemnised between *Robert* and *Susannah*, after reciting that *Phillips Monypenny* had, under a deed dated 1829, a power of appointment over an estate called *Chittendens*; that *Robert* had, under a deed dated 1832, a power of appointment over an estate called *Gobles*; that *Robert* was under the will of his father entitled to one-fifth of the produce of an estate called *Merrington*, and that *Susannah* was under the will of her father entitled to an annuity of 200*l.* to her

By antenuptial settlement in 1835, reciting that upon the treaty for the intended marriage *P. M.* (uncle of the intended husband) agreed to secure in manner and subject as thereafter expressed to *S. M.* (the intended wife), after his own and his nephew's decease, an annual sum of 300*l.* for her jointure, to be issuing and payable out of the hereditaments thereafter charged therewith, and of or to which *P. M.* was seised or entitled in fee simple, *P. M.* did give, grant, bargain, sell, and confirm to *S. M.* and her assigns one annual sum or yearly rent-charge of £300, to be charged upon and yearly issuing and payable out of all and singular the manors of (mentioning certain manors), and also all and singular the hereditaments in the several parishes of (naming certain parishes) of or to which *P. M.* or any person in trust for him was seised or entitled for an estate of inheritance at law or in equity,—*Habendum* to *S. M.* during her life in part of her jointure; and *P. M.* covenanted, for himself, his heirs, and assigns, that in case the same should be in arrear, it should be lawful for *S. M.* to enter into and distrain upon the premises, and to hold and enjoy the same, and receive the rents as therein mentioned, until the arrears were paid. And for better securing the said rent-charge *P. M.* did thereby bargain, grant, sell, demise, and confirm the premises to trustees for a term of years, upon the usual trusts for that purpose. After *P. M.*'s death it appeared that he had only had an estate for life in the premises.

Held, by the Vice-Chancellor, assisted by Barons *Bramwell* and *Watson*, that there was not in the settlement any covenant on which the grantee or the trustees of the term could maintain an action.

And *held* by the Vice-Chancellor, that, there being no covenant in the settlement on which an action could be maintained at law, there was no separate equity which this Court could fasten upon the conscience of the settlor.

The rule, that parties making representations, upon the faith of which a marriage is afterwards solemnised, must make good such representations, does not apply to a case like the above.

separate use, and to a legacy of 1000*l.* absolutely, it was recited as follows :—" And whereas, upon the treaty for the said intended marriage, the said *Phillips Monypenny* proposed and agreed to secure (in manner and subject as hereinafter is expressed,) to the said *Susannah Dearden*, after the decease of the survivor of them the said *Phillips Monypenny* and *Robert Monypenny*, in case she should survive them, an annual sum or yearly rentcharge of 300*l.* for her jointure, to be issuing and payable out of the manors and other hereditaments hereinafter charged therewith, and of or to which he the said *Phillips Monypenny* is seised or entitled in fee simple." It was then witnessed as follows : " That, in pursuance and part performance of the said agreement on the part of the said *Phillips Monypenny*, and in consideration of the said intended marriage, he the said *Phillips Monypenny* hath given, granted, bargained, sold, and confirmed, and by these presents doth give, grant, bargain, sell, and confirm unto the said *Susannah Dearden* and her assigns, in case the said intended marriage shall take effect and she shall survive both of them the said *Phillips Monypenny* and *Robert Monypenny*, one annual sum or yearly rentcharge of three hundred pounds of lawful money of Great Britain, to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors or reputed manors of *Maytham Nether Frodsham* and *Kensham* in the said county of *Kent* and also all that mansion house called *Maytham Hall* in the same county and also all and singular the messuages lands tenements and hereditaments in the several parishes of *Rolvenden Tenterden Benenden Sandhurst Newenden St. Mary* in *Wittersham* and *Stow* in the Isle of *Oxney* in the said county of *Kent* of or to which he the said *Phillips Monypenny* or any person or persons in trust for him is or are seised or entitled for an estate of inheritance at law or in equity and to be charged and chargeable upon and yearly issuing and payable out of all and singular the rights,

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members, and appurtenances to the same manor, hereditaments, and premises belonging or in anywise appertaining ;” Habendum (subject to certain charges therein mentioned) to *Susannah* and her assigns during her life in part of her jointure, to be paid as therein mentioned. And *Phillips Monypenny* did thereby, for himself, his heirs and assigns, covenant, grant, and agree with and to the said *Susannah*, her executors, administrators, and assigns, that in case and so often as the said rentcharge of 300*l.*, or any part thereof, should at any time be unpaid for twenty-one days, it should be lawful for *Susannah*, her executors, administrators, and assigns (subject as aforesaid), to enter into and distrain upon the hereditaments and premises thereby charged, and to dispose of the distress there found according to law, as in the case of distress for rent reserved on common leases for years ; to the intent that thereby *Susannah*, her executors, administrators, and assigns might be fully paid and satisfied the said rentcharge and every part thereof, and all costs, charges, and expenses attending the recovery of the same ; and also that in case the same rentcharge or any part thereof should be unpaid for forty days (although no formal demand should have been made thereof), it should be lawful for *Susannah*, her executors, administrators, and assigns (subject as aforesaid), to enter into and upon the hereditaments and premises thereby charged, and to hold and enjoy the same, and receive the rents, issues, and profits thereof for her and their own use and benefit, until she or they should be paid the said rentcharge and arrears, and all costs, charges, and expenses occasioned by the nonpayment thereof ; and for better securing to *Susannah*, her executors, administrators, and assigns, the due payment of the said rentcharge of 300*l.*, *Phillips Monypenny* did thereby grant, bargain, sell, demise, and confirm unto the said *Thomas Monypenny* and *Peregrine Dearden*, their executors, administrators,

and assigns, all and singular the manors, hereditaments, and premises thereby charged, as thereinbefore mentioned, with the payment of the said rentcharge, and their rights, members, and appurtenances; Habendum, subject as thereinbefore mentioned, and subject to the said rentcharge and the remedies for securing the same, to the said *Thomas Monypenny* and *Peregrine Dearden*, their executors, administrators, and assigns for 1000 years, to commence from the decease of the survivor of *Phillips* and *Robert*, sans waste, upon trust, in case the said rentcharge should be in arrear for sixty days, out of the rents and profits, or by demising, mortgaging, or selling the premises, or by bringing actions against the tenants thereof, to pay to *Susannah*, her executors, administrators, or assigns, such arrears as should be so unpaid, and to pay the surplus as therein mentioned. By the same deed, the estates called *Chittendens* and *Gobles* were then appointed and conveyed by *Phillips* and *Robert*, and the share of the estate called *Merrington* was settled in strict settlement; and as to *Susannah's* legacy of 1000*l.* it was declared, that, after the marriage, it should belong absolutely to *Robert*. The deed contained a covenant on the part of *Phillips Monypenny* for further assurance as to the estate called *Chittendens*. It contained no other covenant on his part.

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By his will, in 1839, *Phillips Monypenny* purported to devise the *Maytham Hall* estate (being the greater part of the hereditaments which by the deed of 1835 were expressed to be charged with the annuity of 300*l.* in favour of *Susannah*) to the use of his nephew *Robert* for life, with remainders over. He devised the residue of his real estate to the Plaintiffs and their heirs; and he appointed the Plaintiffs his executors.

Phillips died in 1841, *Robert* in 1842.

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Subsequently, the right of *Phillips* to charge the *Maytham Hall* estate, and to devise the same by his will, was disputed, upon the ground that he was, in fact, merely tenant for life of that estate; and by a decree of the Court of Chancery made in 1851 in the cause of *Monypenny v. Dering* (a), it was declared, that, on the death of *Phillips Monypenny*, one *Robert Thomas Gybbon Monypenny* became absolutely entitled to the estate in question as equitable tenant in tail.

The present suit was instituted by the executors of *Phillips Monypenny* for administration of his estate; and the common administration decree having been made, a claim was brought in on behalf of *Susannah* in respect of the arrears of the annuity of 300*l.* from the death of her late husband.

It appeared that *Susannah* had resorted to some portion of the lands on which the annuity was expressed by the deed of 1835 to be charged (being the only portion of which *Phillips Monypenny* was seised in fee), and by that means had recovered a small part of her arrears.

Argument.
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Mr. *Daniel*, Q. C., and Mr. *Berkeley*, for *Susannah Monypenny*—

The effect of the decree in *Monypenny v. Dering* has been to withdraw from the operation of the indenture of settlement of June, 1835, the bulk of the hereditaments thereby charged with the annuity of 300*l.* in favour of *Susannah Monypenny*; and being precluded by that decree from resorting to the premises so charged for the arrears of her annuity, she is now entitled to have those

(a) Reported 2 D. M. G. 145.

arrears paid out of the personal estate of the testator, or if his personal estate is insufficient for that purpose, then out of his real estate by his will devised to the Plaintiffs.

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Under the settlement of 1835, the jointress is a purchaser for valuable consideration; the deed, therefore, must be read as if she had given an equivalent money value; and so read, it amounts in effect either to a covenant to pay the jointure, or to a covenant for title to the lands expressed to be charged.

For, first, it contains an express recital that the grantor "is seised in fee or entitled for an estate of inheritance at law or in equity," and that recital alone is, in effect, a covenant that he is so. Secondly, the words "give, grant, and sell" in the grant of the annuity, and the words "grant, bargain, sell, and demise" in the demise of the term of years to the trustees, are terms of art, and operate as a covenant: Com. Dig., s.v. "Covenant" (A 4) (a); Hobart, 12; also *Doe dem. Starling v. Prince* (b). Thirdly, the words by which the powers of distress and entry are given,—"And the said *Phillips Monypenny* doth hereby, for himself, his heirs and assigns, covenant, grant, and agree that it shall be lawful," when the rentcharge is in arrear, for the grantee to distrain,—amount to a covenant that she shall be at liberty to do so.

Then, the decree of this Court having deprived the grantee of the powers of distress and entry, and the trustees of the term by which the jointure was secured, that circumstance amounts to a breach of the covenant, and the grantee is entitled to come in as a specialty creditor for the arrears of her jointure: *Randall v. Lynch* (c), *Pordage v. Cole* (d),

(a) Vol. 3, p. 265, ed. Hammond.

(c) 12 East, 179.

(d) 1 Saund. 319 l.

(b) 20 Law J., C. B., 223.

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In *Griffith v. Anvill* (d), a jointure was provided by marriage articles to be paid to the wife, if she survived, out of the husband's real estate; and that fund failing, it was decreed to be a charge on his personal property. Again, in *Probert v. Morgan* (e), upon a bill by a jointress to have the deficiency of her jointure made good out of the assets of her husband and his father, who had both been parties to the marriage contract, it was held that the Plaintiff had a lien upon both estates.

We rely also upon the broad rule of law and equity, that, when, upon proposals of marriage, third persons represent anything material in a light different from the truth, whether innocently or by collusion, they shall be bound to make good the thing in the manner in which they represented it—it shall be, as represented to be: *Montefiore v. Montefiore* (f), and authorities cited in *Money v. Jordan* (g).

Mr. Willcock, Q. C., and Mr. Wickens, for residuary legatees, were proceeding to argue that the testator was under no personal liability in respect of the claim in question; when they were stopped by the Court.

The VICE-CHANCELLOR.—It appears to me that this is simply a legal question, and ought to have been determined by an action. If I am to try it, I should have the assistance of a common law judge; and the concurrence of the

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| (a) 4 Bro. P. C. 604. | (f) 1 Sir Wm. Blackstone, |
| (b) 4 Id. 614. | 363. |
| (c) 2 Sim. 227. | (g) 15 Beav. 372; S. C., 2 D. |
| (d) Colles' P. C. 52. | M. G. 318; and 5 H. L. C. 185. |
| (e) 1 Atk. 440. | |

parties interested in the testator's real estate must be obtained.

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All parties having consented that the question should be determined by his Honour with the assistance of a common law judge, it now came on again for argument before the Vice-Chancellor, assisted by Barons *Bramwell* and *Watson*.

June 26th.

Mr. *Daniel*, Q. C., and Mr. *Berkeley*, were again heard in support of the claim, and cited, further, *Swann v. Stransham and Searles* (a), and Co. Litt. 144. b.

Argument
resumed.

Mr. *Rolt*, Q. C., Mr. *Baggallay*, and Mr. *Honeyman*, for the Plaintiffs, who had administered a large portion of the testator's assets upon the assumption that he was under no personal liability in respect of the rentcharge ;

Mr. *Willcock*, Q. C., and Mr. *Wickens*, for the residuary legatee ; and

Mr. *C. Hall*, for another Defendant in the same interest—

Contended that the deed contained no covenant, express or implied, either for payment of the rentcharge or for title to the property expressed to be charged therewith ; and that the testator was under no personal liability, either at law or in equity, in respect of such jointure. They cited Rolle's Abridgment, 226 ; Co. Litt. 219, 220 ; *Lewis v. Rees* (b), *Colmore v. Tyndall* (c), *Parkhurst v. Smith lessee of Dormer* (d), *Walsh v. Trevanion* (e), *Moore v. Magrath* (f), *Cholmondeley v. Clinton* (g).

(a) Dyer, 257 a.
(b) 3 K. & J. 132.
(c) 2 Y. & J. 605.
(d) Willes, 327.

(e) 15 Q. B. 733.
(f) 1 Cowp. 9.
(g) 2 Jac. & W. 1.

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Mr. *Daniel*, Q. C., in reply.

Judgment reserved.

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Opinion of
BRAMWELL,
B., & WAT-
SON, B.

Mr. Baron BRAMWELL now read the opinion of Mr. Baron WATSON and himself, as follows :—

In this case, the rentcharge being secured on or issuing out of land, of a portion of which the grantor was seised, and to which the grantee has had recourse, the grantee has no power to treat it as an annuity and sue for it as such. It is conceded, therefore, that the only question is—is there a covenant in the marriage settlement on which the grantee or the trustees of the term could maintain an action in the events which have occurred?

Now this is not a question of intention, that is to say, we are not to speculate on the existence of any intention in the grantor's mind, and decide the case as we believe that he had or had not the intention to covenant as alleged, but we are to ascertain the meaning of the words used, to determine the intention *expressed*, and decide accordingly.

It is said, the terms used in the deed are terms of art, which have a definite legal meaning, and must be construed accordingly. But assuming that to be so, it is certain that the context may show that they are not used in that sense. The word "son" has a definite legal meaning—namely legitimate son—but if in a deed it appeared a person was speaking of his illegitimate children, it is clear the word "son" might mean an illegitimate son.

This premised, we now proceed to examine the deed and the matters relied on by Mrs. *Monypenny*. We think that as she is a purchaser for valuable consideration, the deed

ought to have the same construction as though she had given an equivalent money value for the annuity. Now, we think that the recital of the agreement to grant the annuity would, if read by itself, be a recital that the grantor was seised in fee of, or otherwise entitled to, the lands to be charged. It is doubtful whether the words in the grant "of or to which the said *Phillips Monypenny*, or any person in trust for him, is seised or entitled for an estate of inheritance at law or in equity" apply to the manors of *Maytham*, *Nether Frodsham*, and *Rensham*, and the mansion, or only to "all and singular the messuage, &c. in the parishes of *Rolvenden*, &c., in the county of *Kent*," thereby identifying them. Assuming, however, this doubt resolved in favour of Mrs. *Monypenny*, then by the recital and grant together it is recited that the grantor has an estate, or is otherwise entitled in fee simple, in certain named lands. These he affects to charge, and also charges all other lands in certain parishes in which he has a legal or equitable estate of inheritance. But the recital would not operate by itself as a covenant by the grantor. It is not an undertaking or agreement by him that anything has happened or exists, or shall happen. It is a statement of a fact, is the language of both parties, and, treated as an estoppel, binds both, the grantee as much as the grantor, to deny his seisin. Nor would the mere words "give, grant, bargain, and sell," as applied to the creation of an annuity, operate as a covenant, because, alone, they merely assert a power to give or create an annuity. Nor do we think that the words used in the creation of the power to distrain, extensive as they are, "covenants, grants, and agrees that it shall be lawful, when the rentcharge is in arrear, for the grantee to distrain on the premises," are an express covenant that he shall have power to do so. We think that "covenants" and "agrees" mean no more than "grants." So far, therefore, we think there is no covenant.

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But the grantor gives, grants, bargains, and sells a rentcharge, to be charged and chargeable upon, and yearly issuing and payable out of, certain named lands, and all others of which the grantor may be seised or entitled for an estate of inheritance; and he covenants, grants, and agrees that when the rentcharge is in arrear, it shall be lawful for her to distrain on the premises thereby charged, and also that it shall be lawful for her to enter. He afterwards bargains, sells, and demises the premises to the trustees to secure the annuity. This imports the power to do what he assumes to do, whether because seised in fee or otherwise entitled, as much in this grant of annuity charged on and issuing out of the lands, and in this grant of a power of distress on those lands, as "demisi," "dedi," or "concessi," or "bargain and sell," "give and grant" assume the power to do what those words purport to do. Here the grantor assumes the power to grant this annuity out of certain lands, and charge them with it. Then it is said, why is there not as much an implied covenant for title to do so in this case, as in those where the words used were those above mentioned? If the words "of which he or some person in trust for him is seised for an estate of inheritance at law or in equity" apply to the named premises, why, as those are the grantor's words, are they not a covenant by him, which covenant is broken? To show that these words "bargain, sell, and demise" are words of covenant for title, Comyn's Digest, "Covenant," (A 4), Hobart, 12, are referred to. The covenant for further assurance relating to other land does not affect the question.

But such a covenant as is contended for, is a covenant in law, if at all, and a covenant that the grantor has a legal estate; for there cannot be a covenant implied from such words that the covenantor has an equitable estate. Then, if by the deed it appeared that the estate the grantor had and charged was an equitable estate, surely there would be

no implied covenant by the words "give, grant, and demise;" such a construction would make the deed run thus: "Whereas I am seised of an equitable estate in certain lands, out of which I grant an annuity, and covenant I am seised in fee of a legal estate therein." In like way, if the recital showed that the grantor did not know or affirm whether his estate was legal or equitable, it would be unreasonable to imply a covenant which supposed he had a legal estate. Now here the recital is that the grantor is seised or otherwise entitled to the named estates. This would undoubtedly operate to charge such of those tenements as he had an equitable interest in. That the recital is not of a legal estate merely, is confirmed by his afterwards charging all lands in which he has any legal or equitable interest. Indeed, it is by no means clear, as we have said, that those words do not apply to the named estates as well as all others. Then is it reasonable or possible to imply a covenant, which would involve the necessity of the estates charged being legal estates, when it is manifest the grantor in the same deed supposes his interest in the estate charged may be equitable only? We think not. The Plaintiff's construction makes the deed run thus: "I am seised in fee at law or in equity (I don't know or say which) of certain estates, out of which I grant an annuity, with which I charge those estates. I also covenant I am seised in fee of a legal estate therein." This cannot be.

We think, therefore, there is no covenant in this deed for title or quiet enjoyment.

That opinion renders it unnecessary to consider the other question, viz. whether, the grantor being dead, any action could be maintained.

We wish to repeat, we disclaim acting on what may be

1858.
MONTPENNY
v.
MONTPENNY.
Opinion of
BRANWELL,
B., & WAT-
SON, B.

1858.
 MONTPENNY
 v,
 MONTPENNY.

Opinion of
 BRAMWELL,
 B., & WAT-
 SON, B.

guessed to be the grantor's intention. He probably did not intend to covenant, nor did the grantee probably suppose there was a covenant—not, however, because they intended the contrary, but because they did not anticipate the case that has arisen, and so had no intention on the subject. This would not prevent the effect of words in themselves efficacious to create a covenant; but, for the reason we have given, we think the words here create no covenant.

*Judgment upon
 the Legal Ques-
 tion.*

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am much indebted to the learned Judges for their assistance in this case. The question being purely a question of law, I concur with them in the opinion which has been read.

Feb. 22nd.

Upon this cause being mentioned again, a question arose whether the equity had been disposed of.

The VICE-CHANCELLOR.—If I had not been of opinion that there could be no equitable right on the part of the jointress in the absence of a legal right, I should not have asked for the assistance of the learned judges. If the parties wish for my reasons for being of that opinion, I will mention them another day.

March 1st.
*Judgment on
 the Equitable
 Question.*

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The argument at the original hearing turned upon the numerous authorities referred to in *Money v. Jorden*, as establishing the proposition that parties making representations, upon the faith of which a marriage is afterwards

solemnised, must make good the representations so made by them. But it appears to me that that doctrine cannot be applied to a case like the present, where a solemn deed has been executed, and the intention of the parties is to be gathered from that deed, and from that deed only; and that in the present case, if there is not in the marriage settlement a covenant on which the grantee or the trustees of the term could maintain an action at law, this Court cannot go further than a Court of law.

If a contrary rule were adopted, it would follow, that in every case where there is a devise to trustees upon trust to sell, for the benefit of persons, who, when the estate is sold and conveyed, are infants, or otherwise incapable of entering into covenants for title, the trustees might be held bound to make good the representations contained in a recital in the conveyance, that the testator was seised of the property thereby conveyed for an estate of inheritance in fee simple.

In all the cases referred to in *Money v. Jorden*, representations were made previously to the marriage, by which the party making such representations undertook, in effect, though without entering into a solemn contract for that purpose, to make a certain provision, or to do certain other acts for the benefit of the parties; and it was upon the faith of such representations that the marriage was solemnised. But in the case before me, a settlement is executed previously to the marriage. And all that the party does is to recite "that, upon the treaty for the intended marriage, he proposed and agreed to secure the annuity in question in manner and subject as thereafter expressed." That being all he recites,—unless I find within the four corners of the settlement a covenant on which an action can be maintained at law, I apprehend there can be no separate equity which this Court can fasten upon the conscience of the settlor.

1858.

MONTPENNY
v.
MONTPENNY.

*Judgment on
the Equitable
Question.*

1858.

MONTEPENNY
v.
MONTEPENNY.

*Judgment on
the Equitable
Question.*

No doubt this lady has been misled, as every purchaser is misled who purchases an estate upon what proves to be a defective title; but I cannot give her higher rights than she would have at law.

The claim, therefore, must be disallowed.

1857.

Dec. 12th &
17th.

Will—Construction—Bequest to one "or his Heirs"—Substitutional—Lapse.

Where there is a bequest to A. for life, and after his decease to B. "or his personal representatives," or a bequest to B. to be paid so many months after testator's death to B. "or his personal representatives," the Courts have construed it simply as another way of giving B. a vested interest upon the testator's death; and B. dying

before the testator, the bequest has been held to lapse: but if, instead of "personal representatives," the word "heirs" be used, it shows the testator intended the persons he designates as "heirs" to take by way of substitution whenever B. may die, and there shall be no lapse, although B. should die before the testator.

Bequest of residue to A. for life, and at her death a legacy to B. "or his heirs."—*Held*, that the legacy to B. did not lapse by reason of his death in the lifetime of the testatrix, but that his widow and only child took by substitution.

IN THE MATTER OF PORTER'S TRUST,

AND

IN THE MATTER OF THE TRUSTEE RELIEF ACT.

ESTHER PORTER, by her will, after giving two sums of 500*l.* each in the New 4 per Cents. to her two brothers, *Samuel* and *William Porter*, gave to her sister *Sarah*, for her life, everything she died possessed of (except the two before-mentioned sums of 500*l.* each), and also whatever property she might have in the Funds, after paying the said two legacies of 500*l.* each. She then bequeathed as follows:—"And at the death of my said sister I give to my said brother *Samuel Porter*, or *his heirs*, 1,000*l.* in the 4 per Cents."

The testatrix died in November, 1832.

Samuel Porter died intestate in the lifetime of the testatrix, leaving *Ann Porter* his widow, and *John Hall Porter*, his only child, him surviving. *Ann* died in March, 1857; *Sarah* in May, 1857.

Mr. Renshaw, Mr. C. Hall, and Mr. Forster, for various parties, some of whom claimed as next of kin, others as residuary legatees :—

1857.
IN RE POR-
TER'S TRUST.
Argument.

In the events that have happened, *Samuel Porter* having died in the lifetime of the testatrix, the legacy of 1,000*l.* bequeathed to him "or his heirs" at the death of the tenant for life, has lapsed. To prevent lapse, the intention must be clear and indisputable upon the face of the will; and whatever construction might be adopted in the case of a bequest to one or his representatives, to take effect upon the death of the testator, no life estate or other interval being interposed, it is perfectly clear, that where any interval is interposed—where, for instance, there is a bequest to one for life, and after his death legacies are given to others or their representatives, such legacies must lapse by the death of the legatees during the life of the testator. Where there is any period to which the provision for the death of a legatee can be referred other than that of the testator's own life, the Court presumes that he meant to provide for death during that period, and not during his own lifetime: *Corbyn v. French* (a), *Tidwell v. Ariel* (b),—both cases precisely similar to the present: see also *Horne v. Pillans* (c), *Nichols v. Haviland* (d), and *Edwards v. Edwards* (e). *Corbyn v. French* has been frequently cited, see *Gittings v. M'Dermott* (f), and *Bone v. Cook* (g), and always with approbation.

The VICE-CHANCELLOR.—In *Bone v. Cook*, Chief Baron *Alexander* distinguishes between the gift to children and the gift to executors or administrators, in the event of the death of a legatee.

(a) 4 Ves. 418, 435.

(b) 3 Mad. 403.

(c) 2 M. & K. 15.

(d) 1 K. & J. 504.

(e) 15 Beav. 357, 364.

(f) 2 M. & K. 69.

(g) M'Clel. 168.

1857.
IN RE POR-
TER'S TRUST.
Argument.

Mr. Toller, Mr. Walford, and Mr. Cracknal, for various assignees of *John Hall Porter*, contended that the bequest had not lapsed, but had vested in *John Hall Porter*, either as heir at law of *Samuel*, or as his next of kin in its strict sense, that is, nearest in blood. The bequest was not to *Samuel* "or his personal representatives," but to *Samuel* "or his heirs." Had it been to him "or his next of kin," the parties would clearly have been entitled to take by substitution as *personæ designatæ*: *Edwards v. Saloway* (a).

They cited also *Varley v. Winn* (b), *Ive v. King* (c), *Hodgson v. Smithson* (d), *Ashling v. Knowles* (e), *Girdlestone v. Doe* (f), *In re Crawford's Trust* (g), *Salisbury v. Petty* (h), *In re Sheppard's Trust* (i), and *Price v. Lockley* (k).

Mr. Cotterell, for the personal representative of *Ann Porter*, the widow of *Samuel*, concurred that there had been no lapse; but contended, that, under the words "or his heirs," the widow became entitled to one-third part of the legacy bequeathed to *Samuel*; the word "heirs" in a substitutional bequest of personalty meaning not next of kin in its strict sense, that is, nearest in blood, but the persons who, under the Statutes of Distribution, would be entitled to succeed to the personal property of the deceased in case he died intestate: *Doody v. Higgins* (l).

Mr. Renshaw in reply.—*Corbyn v. French*, was not cited in *Ive v. King* (m).

(a) 2 De G. & Sm. 248; S. C.,
on appeal, 2 Phill. 625.
(b) 2 K. & J. 700.
(c) 16 Beav. 46.
(d) 21 Id. 354; S. C., on ap-
peal, 26 Law J., N. S., Ch., 110.
(e) 3 Drew. 593.

(f) 2 Sim. 225.
(g) 2 Drew. 237.
(h) 3 Hare, 86.
(i) 1 K. & J. 269.
(k) 6 Beav. 180.
(l) 2 K. & J. 729.
(m) 16 Beav. 46.

The VICE-CHANCELLOR. — The proposition in *Ive v. King* is very simple and well established, viz. that where there is a bequest to a class, followed by a substitutional bequest in case of the death of any member of the class, there, to determine whether the substitutional bequest is to take effect upon the death of any particular individual, you must first inquire whether he was a member of the class at all. If he was not, it is impossible to predicate substitution with respect to him.

1857.
IN RE PORTER'S TRUST.
Argument.

Le Jeune v. Le Jeune (a) and *Penley v. Penley* (b) were also cited on the principal question; and *De Beauvoir v. De Beauvoir* (c) on the meaning of the word "heirs" in a bequest of personalty.

A further question was argued between the next of kin and the parties claiming as residuary legatees, as to whether the will contained any residuary bequest; but in the view taken by the Court upon the principal point, this question did not require a decision.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case arises with reference to a bequest of 1,000*l.*, given in this way:—The testatrix first bequeaths her residuary property to her sister, *Sarah Porter*, and then proceeds as follows: "And at the death of my said sister I give to my said brother, *Samuel Porter*, or his heirs, 1,000*l.* in the 4 per cents." *Samuel* having died in the lifetime of the testatrix, the question is, whether the bequest of 1,000*l.* has lapsed, or whether the "heirs," as they are called in the will, are entitled to take by substitution.

Dec. 17th.
Judgment.

(a) 2 Kee. 701.
VOL. IV.

(b) 12 Beav. 547.
O

(c) 3 H. L. C. 524.

1857.
 IN RE POR-
 TER'S TRUST.
 Judgment.

The principles which govern the decisions in cases of this kind are extremely clear, and have been laid down with great precision in the case of *Bone v. Cook* (a) by Chief Baron *Alexander*, a judge perfectly conversant with the principles by which Courts of equity are regulated in such cases. There the facts were these :—There was a bequest to one for life, and after her decease to certain legatees, share and share alike ; “and in case of the death of any of the said legatees before their legacies should become payable, then the testatrix directed that the legacy of each of them dying should go to and be paid amongst his or their children, share and share alike ; and in case of such decease of any of the said legatees without having a child or children, the legacy of him or her so dying should go to his or her executors or administrators as part of his or her personal estate.” One of the persons named as legatees died in the lifetime of the testatrix, and without having been married, and the question was whether her legacy lapsed, or whether it passed by force of the latter clause to her executors or administrators as part of her personal estate. The Lord Chief Baron held that it had lapsed ; but he appears to concede, that, under the former clause, children of the legatee, had there been any, would have taken the share by substitution, notwithstanding she died in the lifetime of the testatrix.

That case is perfectly consistent both with the authorities that preceded and with those that followed, bearing in mind the distinction stated by the Master of the Rolls in *Ive v. King* (b), between legacies to a class and legacies to individuals named in the will, with reference to substitutional gifts to children ;—the principle of that distinction being, that, to determine whether such gifts are to take effect, the test in the case of a legacy to a class must necessarily be this, Was the deceased, whose supposed share is claimed, or was he not ever a member of the

(a) M'Lel. 168.

(b) 16 Beav. 53.

class ; in other words, was he or was he not ever an object of the gift ? If he was not, there can be no substitution.

1857.

IN RE PORTER'S TRUST.

Judgment.

So far the law is perfectly clear ; but the difficulty in the present case—and the same difficulty arose in *Corbyn v. French* (a) and *Tidwell v. Ariel* (b), as well as in *Bone v. Cook* (c),—consists in determining whether the clause “or his heirs” was intended as a clause of substitution—whether by that clause the testatrix intended to substitute in the room of the legatee some other persons called “his heirs,” or simply to denote that the legatee was to take a vested and transmissible interest in the legacy, the words “or his heirs,” superfluous in themselves, being added by the testatrix *ex abundanti cautela*, and as “an anxious expression,” as Chief Baron *Alexander* described it, that the legatee was to take a transmissible interest if he survived her.

Now when I examine the case of *Corbyn v. French*, I find that the principle of the decision was, that if it be clear that an alternative bequest was intended to be substitutional, then it shall take effect, notwithstanding the death of the original legatee in the lifetime of the testator ; if it be not clear that it was intended to be substitutional—if it appears to have been intended merely as an expression of the testator's intention that the interest given to the original legatee should be vested in and transmissible by him, then the legacy will lapse, unless the original legatee survive the testator.

In *Corbyn v. French*, the residue was bequeathed to the testator's widow for her life, and after her death part of it was given to *Elizabeth Cooper*, or to her proper representative, in case she should not be living at the widow's decease ; and other equal parts of it were given to *John Barker* and three others, “or their representatives or repre-

(a) 4 Ves. 418.

(b) 3 Madd. 403.

(c) M'Lel. 168.

1857.
IN RE POR-
TER'S TRUST.
Judgment.

sentative." *John Barker* died in the testator's lifetime; and what Lord *Alvanley* says is this, "As to the legacy to *John Barker*, I think the question can hardly be raised upon this will; for see the preceding legacy to *Elizabeth Cooper*. Would not that have lapsed if *Elizabeth Cooper* had died in the lifetime of the testator? Beyond all question it would. It is nothing more than saying it shall go to her representatives if she dies before his wife. As to the others, I am of opinion it is nothing more than a gift to them at the death of his wife; but it was intended *only as a beneficial interest to them*, and must as such *vest in them* before it could be transmissible." (So that he treats it as not being in any way substitutional.) "The rules upon which the Court proceeds are perfectly established. A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or to his representatives, it can mean anything but in case of his death in the life of the testator. But it is perfectly clear that where the fund is given to one for life, and after the death of that person to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator." And he decided that it was impossible in that case, without transgressing every rule as to vesting, to hold the legacy vested, the legatee not having lived to take the benefit under the testator's will (a).

The case there pointed at by Lord *Alvanley*, and which he said it was not necessary for him to determine, actually arose in *Gittings v. M'Dermott* (b), where the bequest was to certain persons nominatim, "or" to their heirs; and the Court arrived at the conclusion that the disjunctive

(a) 4 Ves. 435.

(b) 2 M. & K. 69.

word "or" must mean substitution. The disjunctive marked plainly that the testator intended to provide for an alternative bequest, viz. to the legatees, if they should survive; and if they should not, to their "heirs," as they were called in his will.

1857.
IN RE POR-
TER'S TRUST.
Judgment.

Now does *Tidwell v. Ariel*^(a) require me to adopt a different view upon the question, whether the bequest is substitutional in the case now before me? It is clear that *Tidwell v. Ariel* is on all fours with the present; for whether the direction be that the legacy shall be paid, as there, a few months after the testator's decease, or, as here, at the death of a tenant for life, is plainly immaterial; and the only question is whether, the word "heirs" in a bequest of personalty being now decided to have a meaning different from what was attached to it at the date of that decision, the same construction is to be put upon the bequest.

In considering this question, it is important to see what were the facts in *Tidwell v. Ariel*. There was first an absolute bequest to the testator's daughter *Dorothy*, followed by other legacies to other persons, then a direction that all the legacies should be paid at the end of a year after the testator's decease, "or to their several and respective heirs." *Dorothy* died in the lifetime of the testator, and the bill was filed by the son and heir and by the husband of the deceased, the son contending that the legacy vested in him as heir and persona designata (not as next of kin or under the statute), the husband contending that in case the Court should be of opinion that the testator meant by the word "heir," with reference to the nature of the property bequeathed, rather to denote the personal representatives of his legatees, then the legacy to *Dorothy* his late wife vested

(a) 3 Madd. 403.

1857.
 IN RE POR-
 TER'S TRUST.
 Judgment.

in him as *her administrator and personal representative*. The Vice-Chancellor (I observe it was Sir *John Leach*, not Sir *Thomas Plumer*) says this:—"The legacy of 600*l.* is, in the first place, given to *Dorothy*, simpliciter, as a mere personal legacy, failing by her death before the testator. The testator afterwards directs that his respective legacies shall be paid by his trustees at the end of one whole year next after his decease, or to their several or respective heirs. It is said that this direction is inconsistent with a mere personal gift to *Dorothy*, and is, therefore, a substitution of a new legatee in the event of her dying before the testator. If the direction had been that the respective legacies should, at his death, be paid to the legatees or their respective heirs, the inconsistency contended for would have existed; but a payment to the *representative* at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee" (a). In other words, the term "heirs," being treated as used by the testator in the sense of "representatives," this was held to be simply an absolute bequest to *Dorothy*, to lapse if she did not survive the testator.

Assuming that the word "heir," occurring in such a bequest, was to be construed as simply equivalent to "personal representative," that decision is entirely consistent with Lord *Alvanley's* in *Corbyn v. French*; but if "heirs" mean not the representative as such, but those who take beneficially and free from the first legatee's debts, then they are inconsistent with an absolute gift to the first taker (b).

But now as to the word "heir" and the construction put upon it in *Tidwell v. Ariel*. At the date of that decision,

(a) 3 Madd. 409.

(b) See *Edwards v. Saloway*,
 (12 Jurist, 493, affirmed on ap-

peal, 2 Phill. 627; *S.C.*, 12 Sur.
 487), overruling *Baker v. Han-*
bury (3 Russ. 340).

Vaux v. Henderson (a) was not reported, and the Plaintiffs in *Tidwell v. Ariel* claiming, the one simply as heir at law, the other simply as personal representative, and the Court being of opinion that the word "heir" meant "personal representative," there was nothing to be done but to dismiss the bill; but now it is well settled that where the word "heir" occurs in a gift of personal property, and the heir at law does not take as *persona designata*, the term "heir" shall mean not personal representative, but those who for the purposes of succession stand in regard to the personal property of the testator in a position analogous to that in which the heir at law would stand in regard to his real property. It has often been said, that, in such cases, the word means next of kin, but in *Doody v. Higgins* (b), I held it must mean such persons as would have been entitled under the Statutes of Distribution to succeed to the personal property of the deceased in case he had died intestate, including, therefore, a widow.

1857.
IN RE PORTER'S TRUST.
Judgment.

But if such be the persons who are to take as "heirs" under a bequest to a person "or his heirs," must they not necessarily take as *personæ designatæ*? In no sense do they take by way of transmission. They do not take the property charged with the debts of the deceased. They are in no sense his "representatives." In every such gift the parties indicated as "heirs" must take as *personæ designatæ*; and, if so, they must take by substitution, and the gift must be as clearly a substitutional gift as in the case of a bequest to one "or his children," or to one "or his next of kin," or any other designated class.

I should follow most strictly the authorities of *Corbyn v. French*, and *Tidwell v. Ariel*, to this extent, that where there is a bequest to A. for life, and, after his decease, to B. or "his executors," or to B. "or his personal represen-

(a) 1 Jac. & W. 388, n.

(b) 2 K. & J. 729.

1857.

IN RE POR-
TER'S TRUST.*Judgment.*

tatives," or a bequest to *B.* to be paid so many months after the testator's decease to him "or to his personal representatives," it is simply another way of giving a vested interest to *B.* upon the testator's own death, and if *B.* die before the testator, the bequest shall lapse; but, if instead of "personal representatives" the word "heirs" be used, as here it is used, I apprehend that circumstance shows an intention on the part of the testator that the persons he designates as "heirs" are to take by way of substitution whenever *B.* may die, and the bequest will not lapse although *B.* may die in the lifetime of the testator.

Therefore, in this case, I must hold, that, in the events that have happened, there has been no lapse of the 1,000*l.* bequeathed to *Samuel*, but the widow and the son, or his assignees, are entitled—the widow to one-third, and the son, or his assignees, to the other two-thirds of the fund.

Minute.

DECLARATION and order accordingly.

1858.

IN THE MATTER OF THE TRUSTS OF THE WILL OF *Feb. 27th.*
JOHN JAMES HOWELL COE, DECEASED,

AND

OF THE ACT 10 & 11 VICT. c. 96, FOR THE RELIEF
OF TRUSTEES.

THE testator, by his will, in 1838, bequeathed his residuary personal estate to his executors upon trust to invest as therein mentioned; and to stand possessed of the securities upon which it should be invested, upon trust to pay the dividends to his wife during her life, and, after her decease, upon trust to make a weekly allowance to his son *Samuel* or his children, if he should have died leaving children, towards his or their maintenance and support, such allowance to be in the discretion of his executors or the survivor of them, his executors or administrators. The will then proceeded in these words:—"And I hereby declare that it shall be in the discretion of my executors, or the survivor of them, his executors or administrators, (and during the life of my wife with her consent in writing), to advance all or any part of the principal money of such stocks, funds, and securities, to my said son *Samuel*, (or to his children, if he should be dead), in or towards his or their maintenance or advancement in the world; it being my wish that my said son (if living) should have the whole benefit of such moneys, if he should conduct himself steadily and to the satisfaction of my said executors, or the survivor

Will—Construction—Trustees—Discretion—Paying Fund into Court—10 & 11 Vict. c. 96.

Testator by his will declared it should be in trustees' discretion to advance all or any part of the principal of a fund to his son, or to his children, if he should be dead, in or towards his or their maintenance or advancement in the world, it being his wish that his son (if living) should have the whole benefit of such moneys if he should conduct himself steadily and to the satisfaction of his trustees,

with gifts over, in the event of the whole of such moneys not having been advanced by the trustees. The son having assigned his interest under the will, the trustees, after the widow's death, paid the fund into Court under the Trustee Relief Act, but did not suggest that the son had conducted himself otherwise than steadily and to their satisfaction:—*Held, first*, upon the construction of the will, that this was, in effect, a trust for the son with a power for the trustees to deprive him of the fund if he should not conduct himself steadily and to their satisfaction; *secondly*, that, the trustees having declined to exercise that power, it was not competent to this Court to exercise it; and the fund was ordered to be transferred to the assignee.

1858.
IN RE COE'S
TRUST.
Statement.



of them, his executors or administrators; and in the event of my said son leaving children, and the whole of such moneys shall not have been advanced by my said executors or the survivor of them, his executors or administrators, under the provisions hereinbefore contained, then I give and bequeath the same unto and amongst the said child or children, as and when he, she, or they shall respectively attain the age of twenty-one years; but if my said son shall depart this life without having had the whole of such moneys advanced to him under such provision, and without having had any child or children him surviving, or if such child or children shall depart this life under the age of twenty-one years, also without having received, or without having had such moneys advanced to them under such provision, then I give and bequeath the same unto and amongst " (certain residuary legatees), " share and share alike."

The testator died in 1841; his widow in 1856.

In the interval *Samuel* executed assignments, vesting all his interest under the will in the Petitioner absolutely.

Upon the death of the widow, the trustees paid what remained of the fund, (341*l.* 0*s.* 10*d.*) into court; but they did not suggest that *Samuel* had conducted himself otherwise than steadily, and to their satisfaction.

The petition prayed to have the fund in court transferred to the Petitioner.

Argument.

Mr. *Renshaw* for the Petitioner contended, that, upon payment of the fund into court, the discretionary power of the trustees to determine how much should be allowed or advanced for the maintenance and benefit of the testator's son as in the will mentioned, and to reserve what in

their opinion might not be requisite for those purposes for the benefit of those in remainder, ceased, and the Petitioner, as his assignee, became entitled absolutely to the whole of the fund so paid in, by analogy to the cases, where there is a discretionary power in trustees to apply moneys for the personal benefit of a person who afterwards becomes bankrupt or insolvent, and no clause of forfeiture or cesser in the event of bankruptcy or insolvency, nor any limitation over expressly consequent upon that event, and the assignees are held entitled, notwithstanding a general limitation over: *Snowdon v. Dales* (a), *Piercy v. Roberts* (b); see also *Green v. Spicer* (c).

1858.
IN RE COE'S
TRUST.
Argument.

The VICE-CHANCELLOR.—*Green v. Spicer* was more like the case of *Brandon v. Robinson* (d)—a complete gift, then an attempt to fetter it, and no gift over.

Mr. Renshaw.—In *Snowdon v. Dales*, and *Piercy v. Roberts*, there was a clear gift over; see also *Younghusband v. Gisborne* (e), where there was an express attempt to guard the fund from alienation.

The VICE-CHANCELLOR.—Do the trustees suggest anything as to misconduct on the part of *Samuel*?

Mr. Wood for the trustees.—They have no suggestion to make on that subject. They are merely desirous of being relieved, and with that view have paid the money into court.

Mr. Hardy for the children of *Samuel*, and for the residuary legatees, contended, that, according to the true construction of the will, the trustees had in regard to the principal money merely a discretion. No duty, no trust

(a) 6 Sim. 524.

(b) 1 M. & K. 4.

(c) 1 R. & M. 395.

(d) 18 Ves. 429.

(e) 1 Coll. 400.

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 Argument.

was imposed upon them, and, unless they exercised their discretion in favour of *Samuel*, the Court could not exercise it for them. He cited *Twopenny v. Peyton (a)*, to show that a legacy given to trustees, to be applied clearly for the personal benefit of a cestui que trust, would be protected from his assignees, even where he was bankrupt or insolvent.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This will is obscurely expressed, but the last clause is so strong in favour of an absolute gift to the son, that in the events which have occurred I cannot deprive his assignee of the fund.

The words are, "It being my wish that my said son (if living) should have the whole benefit of such moneys, if he should conduct himself steadily, and to the satisfaction of my said executors, or the survivor of them, his executors or administrators." Looking to those words, it would be impossible to hold, that if the trustees had died in the lifetime of the testator, the fund would not have been impressed with a trust for the absolute benefit of the son.

This is not a mere case of a power to advance the whole or part of a fund for the benefit of the party in question; but the fund is vested in the trustees, upon trust to pay the dividends to the testator's widow during her life, and after her death, in effect, as if the testator had said "in trust for my son," but subject to a power in the trustees to deprive him of it if he should not conduct himself steadily, and to their satisfaction. Then, the trustees having refused to exercise in any way the discretionary power so

(a) 10 Sim. 487.

given to them, I apprehend it is not competent to this Court to exercise it. In the absence of any act on their part in exercise of their power to deprive the son—for that is the real nature of the power given them by the testator, and not a power to advance the fund or any portion of it for his benefit,—this Court cannot do any act for that purpose.

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The trustees of the fund, after the death of the widow, are to make a weekly allowance to the son or his children, if he should have died leaving children, towards his or their maintenance and support, such allowance to be in the discretion of the trustees; and then the will proceeds thus:—
“And I hereby declare that it shall be in the discretion of my executors or the survivors of them (and, during the life of my wife, with her consent in writing) to advance all or any part of the principal money to my said son (or to his children, if he should be dead) in or towards his or their maintenance or advancement in the world, it being my wish (and this is the strong part of the case) “that my said son (if living) should have the whole benefit of such moneys, if he should conduct himself steadily, and to the satisfaction of my said executors.” It appears to me that those words are just as strong as if the testator had said, ‘My executors are to hold the moneys in trust for my said son, if he conducts himself steadily and to their satisfaction.’

The trustees had clearly a discretionary power of *depriving* the son of the principal moneys in question, but that is a power which this Court cannot exercise; and as they have renounced their power by paying the fund into court, it has vested in the son—or, I should say, in the Petitioner as his assignee—absolutely.

I must, therefore, order the fund to be transferred to the Petitioner.

Ordered accordingly.

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VANDENBERG v. PALMER.

March 25th.

*Voluntary
Trust—Valid
Declaration of
—How Evi-
denced—
Transfer to
avoid Legacy
Duty.*

A. V., a merchant in *China*, directed his correspondents in *London* to transfer 1000*l.* from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents "that he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children," "that he had appropriated it to them, and his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed "*A. V., Esq., exchange account on account of children,*" previously informing him of their intention so to do:—*Held*, that by the first letter a trust was well created in favour of the children, although the fund was still so far in the control of *A. V.* as to be liable to his drawing; and notwithstanding *A. V.*, in one of the letters, had desired his correspondents to consider it as "subject to the order of his executors" in the event of his death.

The authorities on this subject examined, and *Gaskell v. Gaskell* (2 *You. & J.* 502) explained.

ON the 18th of April, 1853, *Antonio Vandenberg*, late of *Canton*, merchant, since deceased, wrote from *Canton* to Messrs. *Palmer & Co.*, merchants, who were his correspondents in *London*, as follows:—"I beg you will have the goodness to transfer from my tea account a sum, so as to make it 1000*l.*, which is to be invested in *East India Company's* bills, in *London*, and remitted to Messrs. *Dent & Co.* here, for them to return you in clear credit, and to be kept so employed with activity for the benefit of my children; and I should like you to do so immediately after the receipt of this, and from its interest and profit (I mean from the said sum) to pay for their schooling and expenses in *London*, and their passage back when their education is complete. By the August mail, in which Mr. *Lopes* will return, you will be pleased to send me an account of what you have disbursed with my children up to that time, leaving only 1000*l.* for them employed as above recommended."

Messrs. *Palmer* accordingly, on the 24th of June, 1853, remitted to Messrs. *Dent & Co.* at *Canton*, bills of the *East India Company* to the value of 1,000*l.*, and at the same time wrote to *Vandenberg* as follows:—"In compliance with your instructions, we send by the present

Messrs. *Palmer* accordingly, on the 24th of June, 1853, remitted to Messrs. *Dent & Co.* at *Canton*, bills of the *East India Company* to the value of 1,000*l.*, and at the same time wrote to *Vandenberg* as follows:—"In compliance with your instructions, we send by the present

mail 1000*l.*, or, at 2*s.* C. R., 10,000 in *East India Company's* bills on *Bengal*, to our mutual friends, Messrs. *Dent & Co.*, with orders to remit the proceeds to us in undoubted bills on your account, and shall continue to employ this sum in a similar manner until otherwise directed. We charge the amount to your general account (of which we enclose a sketch), thus leaving 500*l.* at credit of your children's account, which we doubt not you will approve ; as it would hardly be safe to reckon upon paying their expenses out of the profits of an exchange operation of so limited character."

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—
Statement.

On the 15th of August, 1853, *Vandenberg* wrote to Messrs. *Palmer* as follows :—"I note the remittance of 1000*l.* or C. R. 10,000 to Messrs. *Dent & Co.*, who have informed me of the same, and as I being (*sic*) on the spot, they desired to have my opinion as regards the re-investment, which of course I declined giving, as I consider myself to have no further control over that amount, as it belongs to my children, which sum I wish you to keep continually employed backwards and forwards for their benefit, and, as long as I am here, I will remit you regularly such sums as may be necessary for their schooling expenses, so that this 1000*l.* may not be touched for the present for the said purposes."

On the 24th of October, 1853, Messrs. *Palmer* wrote to *Vandenberg* as follows :—"We have received from Messrs. *Dent & Co.* a remittance of 1048*l.* 8*s.* 3*d.*, being returns for 1000*l.* sent to them in *East India Company's* bills on your account, per mail of 24th June. We shall return this amount to Messrs. *Dent & Co.* on your account in bar silver, by mail of 4th November, with instructions to send back the proceeds on most favourable terms. We shall open a separate account to be called 'Exchange account $\frac{1}{4}$ Children' for this transaction."

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An account was accordingly opened in Messrs. *Palmer & Co.*'s books, headed "*A. Vandenberg, Esq., Exchange account o/a Children in account with Palmer & Co.*" in which all transactions relating to the 1000*l.*, and the exchanges for the same, were duly entered.

On the 25th of October, in the same year, *Vandenberg* wrote from *Canton* the following letter to Messrs. *Palmer & Co.*:—"Mr. *E. J. Gilman* having been kind enough to promise me and my brother-in-law, Mr. *P. Lopes*, to look after my children during their stay in *England* pursuing their education, and I have made arrangements to place in the hands of Messrs. *Ashton & Co.* a small sum of money for their schooling and other expenses, that you will not be troubled hereafter with any calls for money on the said account, you will please, therefore, after the payment of Mrs. *Webster's* fees for six months, ending 10th of June next, as per my letter of the 10th inst., to add the balance of this account to the 1000*l.* already invested in exchange operations between *England* and *China*, and in your and Messrs. *Dent & Co.*'s hands, which sum has been appropriated by me to them, and you will be pleased to consider as theirs, and subject to the order of my executors in the event of any accident to myself, and quite separate from my general account with your firm."

In June, 1855, *Vandenberg* died intestate and in insolvent circumstances.

At the date of the letter of the 18th of April, 1853, the deceased had three children, all of whom were still infants, and who now, by their next friend, filed their bill against Messrs. *Palmer & Co.*, praying that the amount standing to the credit of the exchange account on account of the children of the deceased might be ascertained; and that it might be declared that the amount so standing to

the credit of that account became and was subject to a trust in favour of the Plaintiffs, and for consequent relief.

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Messrs. *Palmer* stated by their answer, that, on the 20th of June, 1853, when they received the letter of April, 1853, they estimated that there would be a balance in favour of the deceased on the transactions then pending, but such balance was not then ascertained, and, in fact, there was not, either on the 18th of April or on the 20th of June, 1853, 1000*l.* or any other sum due from their firm to the deceased; that, in November, 1854, it was ascertained that on the result of all transactions the deceased was indebted to the firm, and from that time until his death continued so indebted; and that at his death a balance of 3300*l.* was due from his estate to their firm. They further stated, that, up to the time of his death, they treated the several sums carried to the "Exchange account *o/a* Children" as part of the assets of the deceased, and liable to be applied by them in discharge of the balance due from him to their firm; but having been advised by counsel that a valid trust had been created of such sums in favour of the children of the deceased, they did not now make any claim thereto.

It appeared that a posthumous child of the deceased had been born since the institution of the suit.

Mr. *Hetherington*, in the absence of the *Solicitor-General* (Sir *H. Cairns*) for the Plaintiffs, contended, that, by the letter of April, 1853, a valid trust was created in favour of the Plaintiffs; and that the amount now standing to the credit of the exchange account on account of the children was subject to that trust.

Argument.

Mr. *Cotton*, for Messrs. *Palmer & Co.*, did not dispute the Plaintiffs' claim, if the Court should be of opinion that a

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valid trust was created. He submitted, however, whether the posthumous child did not take an interest under such trust.

Mr. *Taylor*, for the personal representative appointed in the suit to represent the general creditors of the deceased, contended, that the amount now standing to the credit of the exchange account on account of the children of the deceased formed part of the personal estate of the deceased at the time of his death, and as such belonged to his general creditors. The alleged trust was voluntary, and never completely declared. To the last the fund was in the power of the deceased.

The VICE CHANCELLOR.—That is not inconsistent with its being subject to a trust. It might be in the power of the deceased quâ trustee: *Wheatley v. Purrr* (a).

Mr. *Taylor*.—But here the deceased speaks of it as “subject to the order of his executors” in the event of his own death. To the last, the trust (if any) might have been revoked: *Gaskell v. Gaskell* (b), *Hughes v. Stubbs* (c), *Smith v. Warde* (d).

[He also relied on the circumstance, that there was not, either at the date of the letter of April, 1853, or subsequently, any balance due from Messrs. *Palmer* to the deceased; and argued, that, having regard to the large amount due from the deceased to Messrs. *Palmer* at the time of his death, and the circumstance of his own insolvency, the Court would infer that the deceased was indebted at the time of that letter to such an extent as to render the trust (if any), voluntarily declared by that letter, fraudulent and void as against creditors.]

A reply was not heard.

(a) 1 Kee. 561.
 (b) 2 Y. & J. 502.

(c) 1 Hare, 476.
 (d) 15 Sim. 56.

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I think this case is sufficiently clear, to enable me to adjudicate upon it without requiring the creditors of the deceased to be further represented than they are at present.

All the cases that have been cited in favour of the contention that a valid trust has not been created, appear to me to be distinguishable from the present.

Upon the first letter, if it stood alone, it would be open to doubt whether the deceased meant to part with all control over the fund. In that letter he writes thus to Messrs. *Palmer* :—"I beg you will have the goodness to *transfer from my tea account* a sum so as to make it 1000*l.*, which is to be invested in *East India Company's* bills in *London*, and remitted to Messrs. *Dent & Co.* here, for them to return you in clear credit, and to be kept so employed with activity for the benefit of my children ; and I should like you to do so immediately after the receipt of this." Then come these words, "and from its interest and profit (*I mean from the said sum*) to pay for their schooling and expenses in *London* and their passage back when their education is complete." These words are ambiguous, and taken alone would leave it open to doubt whether the deceased meant to part with all control over the fund. The letter then proceeds, "By the August mail you will please to send me an account of what you have disbursed with my children up to that time, leaving only 1000*l.* further employed as above recommended."

In reply to that letter, which was written in April, 1853, Messrs. *Palmer*, on the 24th of June, write thus to the deceased—"In compliance with your instructions, we send by the present mail 1000*l.* or at 2*s.* 10,000 *Company's* Rupees, in *East India Company's* bills on *Bengal* to our

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mutual friends, Messrs. *Dent & Co.*, with orders to remit the proceeds to us in undoubted bills *on your account*, and shall continue to employ this sum in a similar manner *until otherwise directed*. We charge the account to your general account, of which we inclose sketch, thus leaving 500*l.* at credit of your children's account, which we doubt not you will approve, as it would hardly be safe to reckon upon paying their expenses out of an exchange operation of so limited character."

Now, stopping there, two things are observable in the correspondence. So far, Messrs. *Palmer* treat the fund as one to be remitted to them "on the deceased's account," and they speak of employing it "until otherwise directed," showing that, in their apprehension, the fund up to that time was a fund entirely under the control of the deceased; and if the case rested there, I should have no hesitation in holding that no valid trust was created, and that the transaction resulted in nothing more than an agency on the part of Messrs. *Palmer* for the deceased.

But the next letter seems to put it out of doubt. After receiving Messrs. *Palmer's* letter the deceased writes, "I note the remittance of 1000*l.* or 10,000 Company's Rupees, to Messrs. *Dent & Co.*, who have informed me of the same. And as I being on the spot they desired to have my opinion as regards the re-investment, *which of course I declined giving, as I consider myself to have no further control over that amount, as it belongs to my children:*" (No words could be stronger than these, and if they are not sufficient to renounce all ownership of the fund, one is at a loss to conceive what words would be sufficient for that purpose): "which sums I wish you to keep continually employed backwards and forwards for their benefit, and as long as I am here I will remit you regularly such sums as may be necessary for their schooling expenses, so

that this 1000*l.* may not be touched for the present for the said purposes." In other words, he says, "I will have nothing to do with the fund; I renounce all control over it, even as regards its re-investment; it belongs to my children, not to me."

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The only shadow of doubt, after this, arises upon the letter of Messrs. *Palmer*, written a little later, on the 24th of October, in which they say, "We have received from Messrs. *Dent & Co.* a remittance of 1048*l.* 8*s.* 3*d.*, being returns for 1000*l.* sent to them in *East India Company's* bills *on your account*, per mail of 24th June. We shall return this amount to Messrs. *Dent & Co.* *on your account*, in bar silver, by mail of 4th November, with instructions to send back the proceeds on most favourable terms. *We shall open a separate account, to be called Exchange account '1/2 Children,*" (which I suppose means 'on account of children') "for this transaction." And thereupon, they carry the fund to a separate account in his name; but headed with those words. The children were infants, and required a trustee. The father wished to make Messrs. *Palmer* trustees for them; at which they a little hesitated, and wrote the letter which I have just read.

Then, on the 25th of October, the deceased writes to Messrs. *Palmer*,—"Mr. *E. J. Gilman* having been kind enough to promise me and my brother-in-law to look after my children during their stay in *England* pursuing their education, and I have made arrangements to place in the hands of Messrs. *Ashton & Co.* a small sum of money for their schooling and other expenses, that you will not be troubled hereafter with any calls for money on the said account; you will please, therefore, after the payment of Messrs. *Webster's* fees for six months, ending 10th June next, as per my letter of the 10th instant, to add the balance of this account to the 1000*l.* already invested in exchange opera-

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tions between *England and China* and in your and Messrs. *Dent & Co.*'s hands, *which sum has been appropriated by me to them, and you will be pleased to consider as theirs.*" Nothing can be stronger than that, so far ; but then come these words, "*and subject to the order of my executors* in the event of any accident to myself, and quite separate from my general account with your firm."

That passage, "and subject to the order of my executors," is the only one which throws any doubt upon the question ; but taken with the preceding letters of the deceased—in which he says he has declined giving any opinion as to the investment of the fund, that he considers himself to have no further control over it, that it belongs to his children, that he has appropriated it to them, and that Messrs. *Palmer* will be pleased to consider it as theirs,—it appears to me that the reasonable construction of the passage in question is, that the fund is to be subject to the order of his executors after his decease, in the same sense in which it was subject to his own order so long as he lived. That it was in one sense subject to his own order, that is, in the sense that it was to be liable to his drawing, I take to be clear ; but although liable to his drawing, I doubt whether Messrs. *Palmer* could have allowed him to draw upon it except for the benefit of his children. And as regards his executors, they would be in the same position. And the deceased having constituted himself a trustee, which no one could do more strongly than he has done, his executors would hold it in the same capacity. The fund would be subject to their order as trustees, but not otherwise.

That a person can so constitute himself a trustee of a fund, reserving to himself at the same time the control qua trustee over the fund, is clear from many authorities, and amongst others from *Wheatley v. Purr*(a) ; there it is

(a) 1 Kee. 551.

clear that the lady had the control over the fund. She had 3000*l.* in the hands of her bankers upon their promissory note; she sent the promissory note to the bankers, and directed them to place 2000*l.* in the joint names of the Plaintiffs and herself as trustee for the Plaintiffs. The 2000*l.* was entered in the books of the bankers to her account as trustee for the Plaintiffs; and that having been done, she took this receipt or promissory note for it,—“Fourteen days after sight I promise to pay Mrs. *Harriet Oliver*” (which was the lady’s name), trustee for” (then followed the Plaintiffs’ names), “or order, 2000*l.*, with interest at 2½ per cent.,” and that was signed by the bankers. It is clear, that she retained the control over the fund, because upon that document she might have received the money any day from the bankers. The fund was transferred into her name as trustee for the Plaintiffs, and the promise was to pay her as trustee for the Plaintiffs. So here, the fund in question was transferred from the testator’s account to a separate account, called the “exchange account on account of children.” And taking that circumstance in conjunction with the statements in the letters I have read,—that he has appropriated it to the children, that it belongs to them, and he considers himself as having no further control over it, and that Messrs. *Palmer* are to consider it as the children’s,—it appears to me that the case cannot be distinguished from that of *Wheatley v. Purrr*.

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The case of *Ex parte Pye, Ex parte Dubost* (a), is one which I have always considered a leading authority in questions of this nature. There the testator wrote to an agent in *Paris*, authorising him to purchase, and the agent accordingly purchased, an annuity for the benefit of a lady whom he named; but as the lady was married at the time and also deranged, the annuity was purchased in the name of the testator. The testator also sent his agent

(a) 18 Ves. 140.

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a power of attorney, authorising him to transfer the annuity to the lady, which the agent accordingly did, but the testator died before it was done. Lord *Eldon* held that the declaration of trust was complete. He said "with regard to the *French* annuity, the Master has stated his opinion as to the *French* law, perhaps, without sufficient authority," (the Master had stated that by the law of *France*, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death is valid; he therefore stated his opinion, that the annuity was no part of the personal estate of the testator), "or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case: but it is not necessary to pursue that, as upon the documents before me it does appear, that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant" (a). And just so in the present case, the fund was in one sense in the power of the deceased at the time of his death; and in one sense is now in the power of his personal representative, and forms part of his personal estate; yet during his life he had committed to writing a sufficient declaration that he held this part of his estate in trust for the children.

The cases which were cited in support of the contrary contention, and which seem to have been as well chosen for that purpose as any that could have been selected, appear to me to be all of them distinguishable from the present.

With regard to the first—the case of *Gaskell v. Gaskell* (b), the remark occurred to me, which appears to have occurred

(a) 18 Ves. 150.

(b) 2 Y. & J. 502.

to Mr. *Pemberton* in reference to the same case in *Wheatley v. Purrr* (a), "that it would be difficult to support the decision, except upon the ground that the transfer was fraudulent." Certainly, the ground advanced in argument, that the transfer was void, as having been made with the object of defeating the legacy duty, that object being illegal, cannot be maintained at the present day. I apprehend it is perfectly clear at the present day, that there is nothing illegal, or at variance with the strict rules of morality, in transferring property with the view of exempting it from legacy duty, provided the transfer be made in such a manner as to part with all control over the fund for your own benefit. And with regard to the decision, I apprehend the way in which the case was viewed by the Chief Baron was, that, upon the facts in evidence, the testator must be taken to have been attempting to play fast and loose with the fund; that there must have been a general understanding between him and his bankers, that, notwithstanding the transfer, it was still his, and he was still to have control over it; because there were letters there written by the testator to his bankers, on which the Lord Chief Baron relies as implying, that, notwithstanding the transfer, the testator considered he had a control over the funds, and consistently with which he might have revoked the order on his bankers, so as to prevent the trustees from recovering. In the case before me, there is nothing of the kind. Here the deceased has absolutely renounced all control over the fund; he has said in effect 'I will have no control over any question which relates to the fund.' And although he still retained a control over the fund in this sense, that he might have drawn on Messrs. *Palmer* for the amount, he could only have drawn in his capacity of trustee; and the fund when drawn would have been just as much impressed with a trust in his hands, as it had been previously in those of Messrs. *Palmer*.

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(a) 1 Kee. 557.

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The next case cited—that of *Hughes v. Stubbs* (a)—turned entirely on the want of completion of the transaction, so as to place the property out of the control of the testatrix during her lifetime, coupled with the circumstance that she intended only a benefit, to take effect after her death and in connexion with her will. The Vice-Chancellor says, “The principle has been extended to cases in which the author of the gift has had the legal dominion over the property remaining in him, but has completely declared himself to be a trustee of that property for the object indicated: *Ex parte Pye*, *Ex parte Dubost*. But it is clear, also, that a person not intending to give or to part with the dominion over his property, may retain such dominion notwithstanding he may have vested the property in trustees, and have declared a trust upon it in favour of third persons.” Then, after referring to cases on that subject, he says, “The result of the cases is, that the Court looks into the nature of the transaction, and determines, from the nature of the transaction, what the effect of it shall be in divesting the owner of the property to which it relates.” Then he adverts to the facts of that case, and proceeds thus, “There does not appear to have been any subsequent communication of the facts in the lifetime of the testatrix, from which the Court might have drawn the same conclusion as from an antecedent agreement or promise; and, although an antecedent agreement or promise, or a subsequent communication, may not be necessary to the completion of a voluntary trust, the absence of such circumstances leaves me nothing but the transaction itself from which to draw a conclusion. It would be sufficient in this case, to say, that *there is nothing in the transaction which necessarily implies that the testatrix* (intending only a benefit to take effect after her death, and in connexion with her will,) *meant to place this disposition of her property out of her control in her lifetime.*” And then

(a) 1 Hare, 476.

he comes to the conclusion, that the proper inference to be drawn from the facts of that case was, that the testatrix intended the arrangement to supply the place of an alteration in her will, and to stand upon the same footing as a will, and comes to the conclusion, that, in that case, no trust was created for the legatee. All that is perfectly consistent with the view which I take of the case now before me; and if, in this case, I failed to find in the transaction that which necessarily implied an intention on the part of the deceased to place the disposition of this fund out of his control in his lifetime, I should come to the conclusion that there was no valid trust created.

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The third case that was cited—the case of *Smith v. Warde* (a), approaches more nearly to the class referred to in *Hughes v. Stubbs*, of which *Garrard v. Lord Lauderdale* (b) is an example. The Vice-Chancellor, in the course of the argument, asks these questions—“Was the trust, which you contend for, a trust in præsentī, or a trust to take effect in the event of the son surviving the father? When did it become manifest that the son had either an interest in possession or in reversion? I admit that Sir *Lionel* intended to do something for his son; but the question is, whether his words are to be taken strictly, or with reference to what he thought to be the state of the law, without exactly knowing it? Would he not have been surprised if he had been told that all the dividends which he had received were his son’s? His acts show that he did not intend what his letters express, namely, that the two sums of stock should, as soon as they were purchased, become the property of his son.” The whole is a matter of evidence. The Court, as Vice-Chancellor *Wigram* says in *Hughes v. Stubbs*, looks to the nature of the transaction, and the whole of the transaction; expressions contained in letters may be explained away by the acts of the party.

(a) 15 Sim. 56.

(b) 3 Sim. 1; S. C., 2 R. & M. 451.

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And, in *Smith v. Warde*, the Court was of opinion that the letters were explained away by the acts of Sir *Lionel*; those acts showing that, down to his death, he considered the property as his own. In the case before me, I find no acts to explain away or alter the effect of the original letters. Everything is consistent with the direction originally given by the deceased.

As to the after-born child, I cannot treat that child as having any interest in the fund, holding, as I do, that there was a trust created from the moment when the first letter, that of April, 1853, was written. The words are, "for the benefit of my children to pay for their schooling and expenses in *London*, and their passage back." There can be no doubt, upon those words, of the testator's intention to benefit children then existing, and those children only.

As to the fund not being in existence, I cannot consider that question raised upon the facts before me, Messrs. *Palmer* having taken this very handsome course, and the only question being between the personal representative and the children of the deceased. If the fund belongs of right to Messrs. *Palmer*, it is clear it could not possibly be claimed by the personal representative.

As regards the suggestion, that there might be a claim on the ground of the deceased being so largely indebted at the time of his death,—that the transaction might, on that ground, be considered fraudulent and void as against creditors,—it is clear the deceased supposed himself to be perfectly solvent at the date of writing the letter of April, 1853, and that Messrs. *Palmer* supposed the same; and the only fact on which the suggestion is based, is, that two years afterwards he dies without means to meet his debts. It appears to me that I cannot act on that suggestion.

I must, therefore, declare that, by the letter of April, 1853, a trust was well created in favour of the Plaintiffs, and that the amount now standing to the credit of the exchange account on account of the children is subject to such trust.

1858.
VANDENBERG
v.
PALMER.
—
Judgment.

IN RE BARR'S TRUSTS.

WILLIAM BARR, since deceased, by his will, in 1800, bequeathed 10,000*l.* 3 per cent. Consols to four trustees, one of whom was a *Mr. Kemble*, upon trust, to pay the interest to his wife for life, and after her decease, upon trust, in the events which happened, to transfer the principal equally between the testator's four children therein named, of whom *Ann Barr* was one.

The testator died in 1803.

In 1805, *Ann Barr* married *Thomas Slade*.

In February, 1810, a commission of bankruptcy was is-

March 6th,
29th, & 31st.
Bankruptcy—
Commission under the old Law
of—13 Eliz. c. 7
—1 Jac. 1, c. 15
—46 Geo. 3, c. 135—Chose in
Action—Equitable Interest in
—Particular
Assignee giving
Notice—As-
signee in Bank-
ruptcy giving
none—Priority.

The doctrine,
in *Dearle v.*
Hall (3 Russ.
1) as to the
importance of
notice of an
assignment of
an equitable

interest in a chose in action, applies to assignees under a commission in bankruptcy, equally with particular assignees.

Assignees under a commission in bankruptcy omitting to give such notice postponed to a subsequent assignee for value, who gave due notice of his assignment.

The bankrupt deposed, that, at the time of his bankruptcy, one of four trustees of a fund in which he had a contingent reversionary interest, was his intimate friend, and was consulted by him in reference thereto and to the course he should adopt; that upon the occasion of the sale by order of the assignees in bankruptcy of the leasehold premises where the bankrupt's business had been carried on, such trustee lent him money to purchase the premises, and that the money lent was secured upon such lease:—*Semble*, these circumstances, if believed by the Court, would not have constituted such notice of the rights of the assignees in bankruptcy as to give them priority over a subsequent assignee for value who gave due notice of his assignment.

Evidence.—Where any question of fact depends upon the testimony of a single witness, and any inconsistency is apparent between such testimony and the previous conduct of the witness, the Court will look rather to the acts done by him at the time than to his statements when called as a witness.

1858.
IN RE BARR'S
TRUSTS.
—
Statement.

sued against *Thomas Slade*, under which he was declared bankrupt.

By an indenture, dated 1818, *Slade* and *Ann* his wife, in consideration of 1000*l.* to them paid by one *Dowell*, now represented by the Petitioners, granted to *Dowell* an annuity of 100*l.* for three lives and the life of the survivor, who was still living at the hearing of the petition, and assigned their share in the 10,000*l.* upon trusts for securing such annuity.

Notice of this indenture was given to the four trustees of the 10,000*l.* Consols immediately after its execution, and, at the same time, an attested copy of the instrument was delivered to the trustees, which copy was subsequently found in the possession of the surviving trustee.

Dowell had no notice of the bankruptcy when the indenture was executed.

Kemble survived his co-trustees and died in 1821.

Ann Slade died in February, 1856; the testator's widow died in November in the same year.

In March, 1857, the 10,000*l.* Consols was paid into Court under the Trustee Relief Act by the representative of *Kemble* the surviving trustee, and 3022*l.* 11*s.* 8*d.* Consols, part of that sum, was now standing to an account intitled "The separate account of the share of *Thomas Slade* as administrator of his late wife *Ann Slade*, and the incumbancers (if any) on such share."

No part of the annuity secured by the indenture of 1818 was paid; and upwards of 3300*l.* being now due to the petitioners in respect of such annuity, they presented a petition, praying that the residue of the 3022*l.* 11*s.* 8*d.*

after payment of costs as therein mentioned, might be paid to them as the legal personal representatives of *Dowell*.

1858.
IN RE BARR'S
TRUSTS.

Statement.

Slade filed an affidavit in reply to the evidence in support of the petition, by which he deposed that *Kemble* was the trustee who took the active part in managing the trusts of the will; that *Kemble* was deponent's intimate friend, and deponent, at the time of his bankruptcy, consulted him in relation thereto, and took his opinion and advice as to the course deponent should adopt; that *Kemble*, then being aware of the bankruptcy, promised to assist him with money to establish himself in business. That the lease of the premises in which deponent's business had been carried on, was put up for sale by auction, by the direction of the assignees, in 1811; that deponent was desirous of buying such lease, with the view of carrying on business again; and having received from *Kemble* and from another friend promises of assistance, he attended the sale and purchased the lease for 600*l.*; that, to enable him to pay the deposit and complete the purchase, *Kemble* lent him the 600*l.*, and deponent completed the purchase, and the said sum was secured upon the lease and the premises therein comprised; and that, at the time of the loan, *Kemble* was fully informed for what purpose and under what circumstances it was wanted.

It did not appear that any notice was given to the trustees by the assignees in bankruptcy until the year 1835.

Mr. *Rolt*, Q. C., and Mr. *Nalder*, for the Petitioners, contended that the assignee for value under the indenture of 1818, having given notice of his assignment to the trustees of the fund immediately upon the execution of the assignment, had a better title than the assignees in bankruptcy who had given no such notice.

Argument.

1858.
IN RE BARR'S
TRUSTS.
Argument.

Precisely the same question arose, in reference to the Act for the Relief of Insolvent Debtors (a), in *Re Atkinson* (b), where Lord *St. Leonards* held that an assignee for value of an equitable interest, giving notice, has a better title than the assignees in insolvency who have given no notice, the assignee for value having no notice of the insolvency at the date of his assignment; and the law is the same with regard to bankruptcy.

It will be argued contra, that the trustees had notice of the rights of the assignees in bankruptcy, one of them, *Kemble*, having, according to the bankrupt's affidavit, been his friend, and consulted by him in reference to his bankruptcy. But such notice of the fact of bankruptcy is not notice of its consequences as regards the rights of assignees: at the best, it is but constructive notice, and it has never yet been held, that constructive notice can give priority over actual notice of an assignment. On the contrary, it has been expressly held, that actual notice is indispensable: *Thompson v. Speirs* (c), *Ex parte Boulton In re Sketchley* (d). The test of a valid notice for this purpose is this, Was there an intention to give notice (e), and was it given in the same transaction? Here, in the communication between the bankrupt and his trustee, no reference was made to the bankruptcy, except for the bankrupt's own purposes.

Besides, in this case, there have been such laches on the part of the assignees in bankruptcy that they could not be heard to claim the fund. It was their duty to make inquiry as to the property of the bankrupt; and, had they done so, they would have discovered the existence of the fund as early as 1810.

(a) 7 Geo. 4, c. 57.

(b) 4 De G. & Sm. 548; *S. C.*,
on appeal, 2 D. M. G. 140.

(c) 13 Sim. 469.

(d) 1 De G. & Jones, 163.

(e) *Id.* 179.

[They cited also *Dearle v. Hall*, and *Loveridge v. Cooper (a)*.]

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IN RE BARR'S
TRUSTS.
Argument.
March 29th.

Mr. *Greene*, Q. C., for the assignees in bankruptcy,—

The assignees in bankruptcy are entitled to the fund: for,

First.—Having regard to the statutes by which the law of bankruptcy was regulated at the time when this commission was issued, viz. the 13th Eliz. c. 7, the 1 Jac. c. 15, and the 46 Geo. 3, c. 135, it was not necessary for the assignees in bankruptcy to give notice of their rights. It has never yet been held, that a title created, not by ordinary conveyance or assignment, but by Act of Parliament, requires notice to be given of its existence, in order to render it complete and binding against subsequent assignees: and having regard to the terms of these particular statutes, it is clear that the title of the assignees under a commission in bankruptcy to every description of property to which the bankrupt may be or become entitled, is of so high an order as to be good and effectual without notice against all persons whatsoever: *Cooper v. Chitty (b)*, *Carlisle v. Garland (c)*, *Balme v. Hutton (d)*.

The VICE-CHANCELLOR.—Those cases only go to this extent, that all property such as you describe vests in the assignees in bankruptcy. But do the assignees in bankruptcy take a higher interest than they would under a conveyance in the same terms? In *Re Atkinson*, the Act there in question was held to have no such effect.

Mr. *Greene*, Q. C.—That was the Insolvent Debtors Act, in which the words are different from the present. Besides, in insolvency, the assignment is voluntary; whereas in bankruptcy the proceedings are in invitum. But,

(a) 3 Russ. 1. (b) 1 Burr. 20. (c) 7 Bing. 298. (d) 9 Bing. 471, 504, 505.

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Argument.

Secondly.—Assuming notice to have been necessary under the old law in force at the time when this commission issued, the commission was notice to all the world. “A commission is a public act, of which all are bound to take notice:” per Lord Talbot, C., in *Collet v. De Gols* (a). See also *Bartlett v. Bartlett* (b), where Lord Justice Turner says, the Court of Bankruptcy were mistaken, in *Ex parte Newton* (c), in supposing that the assignment to the bankrupt passed nothing without notice to the trustee; and *In re Rawbone's Trust* (d); *Sowerby v. Brooks* (e); and *Cannan v. The South Eastern Railway Company* (f), decided as late as the year 1852, where the distinction for this purpose between a commission and the modern fiat is clearly laid down.

The VICE-CHANCELLOR. — Your argument is, that in this case, after the commission was issued, the trustees could not have paid to any but the assignees in bankruptcy.

Mr. Greene, Q. C.—Yes. And your Honour's decision in *Re Birch's Legacy under Bissell's Will* (g), shows that the recent Act for consolidating the law of bankruptcy does not affect this part of my argument. But, assuming further notice to have been necessary, I contend,

Thirdly.—That, upon the facts of this case as deposed to by the bankrupt's affidavit such notice must be taken to have been given.

The VICE-CHANCELLOR.—Your difficulty there is, that,

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|---------------------------------|----------------------|
| (a) Ca. temp. Talb. 65. | hearing, Id. 476. |
| (b) 1 De G. & Jones, 143. | (e) 4 B. & Ald. 523. |
| (c) 4 D. & C. 138. | (f) 7 Exch. 843. |
| (d) 3 K. & J. 300; S. C. on re- | (g) 2 K. & J. 328. |

if his affidavit is true, he was guilty of a gross fraud in executing the assignment of 1818.

1858.

IN RE BARR'S
TRUSTS.

Argument.

Mr. *Greene*, Q. C.—That *Kemble* knew of the bankruptcy in 1811 cannot be doubted, for he lent the bankrupt 600*l.* on the security of the premises where his business was originally carried on, and took that security from the assignees in bankruptcy.

The VICE-CHANCELLOR.—I cannot consider that as proved without some mortgage deed, some documentary evidence of the fact. At present, the whole rests on the unsupported evidence of a man, who has already assigned and got his money upon the faith of the property being his to assign and not his assignees'.

Mr. *Greene*, Q. C.—It was a contingent reversionary interest in a chose in action, and he might be mistaken in law, and believe, when he assigned for value, that, not having fallen into possession, it had not passed to his assignees in bankruptcy.

The only question is, whether, if knowledge of the fact of bankruptcy be brought home to *Kemble* alone, before notice was given of the assignment of 1818, that circumstance is sufficient to bind the fund. The authorities have determined that it is. Notice need not be in the same transaction; knowledge of the fact is notice, although not made with a view of giving validity to the assignment: *Smith v. Smith* (a), adopted by Vice-Chancellor *Wigram* in *Meux v. Bell* (b), distinguishing that case from *Timson v. Ramsbottom* (c). "Knowledge is enough from whatever quarter obtained; formal notice is not necessary:" per

(a) 2 Cr. & Mee. 231.

(b) 1 Hare, 73.

(c) 2 Kee. 35.

1858. *Patteson, J.*, in *Tibbits v. George* (a); and *Gale v. Lewis* (b),
 IN RE BARR'S TRUSTS. was decided on the same principle.

Argument. The VICE-CHANCELLOR (to Mr. *Nalder*).—The only doubt I feel is as to the commission itself being notice under the old law.

Mr. *Nalder* in reply.—Lord *Talbot's* decision to that effect, in *Collet v. De Gols*, cannot be considered as law. And, indeed, it was so held in *Sowerby v. Brooks* (c), where the Judges expressly say, “The expressions” to that effect, “attributed to the Lord Chancellor ought, in our opinion, to be understood with relation only to the case before him.” I rely on the decision in *Sowerby v. Brooks*, that “the commission is not of itself notice to all the world of a prior act of bankruptcy having been committed.”

The VICE-CHANCELLOR.—There the question was as to the payment of a debt to a bankrupt made after the issuing of the commission. I see the Court, in deciding that such a payment will be protected, expressly adverts to what it describes as “the obvious distinction” between such payments “and the cases of title derived or money received from a bankrupt” (d).

Mr. *Nalder*.—As to that, Lord *St. Leonards* has remarked, “The Court was not then aware of the reversal by the House of Lords of *Hitchcock v. Sedgwick*” (e). “Neither an act of bankruptcy,” he says, “nor a commission of bankruptcy, is notice to the purchaser (f). *Hitchcock v. Sedgwick* was formerly considered as having settled that a commission of bankruptcy is of itself notice to a purchaser. But, upon appeal to the House of Lords, the decree

(a) 5 Ad. & Ell. 107.

(b) 9 Q. B. 730.

(c) 4 B. & Ald. 529.

(d) Id. 534.

(e) 2 Vern. 156 : Sugd. V. & P.

1049, n. k (11th ed.).

(f) Ibid.

against *Sedgwick* was reversed; and the House, in effect, decided that a commission of bankruptcy is not of itself such notice"(a).

1858.
IN RE BARR'S
TRUSTS.
Argument.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

March 31st.
Judgment.

The sole question in this case is, whether the assignees in bankruptcy of a person who became bankrupt in the year 1810 are to be preferred to an assignee for value claiming under an assignment executed to him by the bankrupt in 1818, and of which notice was immediately given to the trustees of the property in question, the assignees in bankruptcy not having given any such notice to the trustees.

It was argued, on behalf of the assignees in bankruptcy, that, although it was determined by Lord *St. Leonards* in *Re Atkinson*(b), that an assignee in insolvency merely stands in the place of the insolvent, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound; so that, if he fails to give notice to trustees of an equitable interest like the present, he will be postponed to a subsequent assignee for value who has taken that precaution,—yet there is a difference in the present case in respect of the very powerful effect of the statutes by which the law of bankruptcy was regulated in the year 1810, when this bankruptcy took place, those statutes giving to assignees in bankruptcy rights and interests, which, it was contended, are of a far higher order than those given by the Act for the Relief of Insolvent Debtors(c)—the Act in question before Lord *St. Leonards*.

(a) 2 Sugd. V. & P. 1051 (11th ed.), and the authorities there cited.

(b) 2 D. M. G. 140.
(c) 7 Geo. 4, c. 57.

1858.
IN RE BARR'S
TRUSTS.
Judgment.

A similar contest was raised in the case of *Mitford v. Mitford*, before Sir *William Grant*(a). There assignees in bankruptcy claimed, as against the widow of a bankrupt, a legacy of stock to which she, or the bankrupt in her right, was entitled during the coverture, and to which she claimed to be entitled absolutely as having survived her husband; and there it was strongly argued on behalf of the assignees, that, by virtue of the Acts with reference to bankruptcy, the effect of the assignment under a commission was so powerful that it vested in the assignees in bankruptcy every description of property which the bankrupt could have reduced into possession or assigned for valuable consideration to a bonâ fide purchaser—in fact, that it was equivalent to a reduction into possession, which would apply here, because the doctrine in *Dearle v. Hall* (b) is this, that, where there is an equitable assignment of a chose in action, everything must be done by the assignee that can be done by him towards approaching to possession, and one step towards such possession is to give notice to the trustees. That was the argument before Sir *William Grant* in the case of *Mitford v. Mitford*; but the way in which he dealt with it was this:—Taking a view, which agrees exactly with that of Lord *St. Leonards* with reference to the assignee in insolvency, he says, “I have always understood that the assignment from the commissioners, like any other assignment by operation of law, passed the rights of the bankrupt precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. . . . In *Worrall v. Marlar* (c), Lord *Thurlow* says, a Court of Equity has much greater consideration for an assignment actually made by contract than for an assignment by mere operation of law; for, as to the latter, when the equitable

(a) 9 Ves. 87. (b) 3 Russ. 1. (c) 1 P. Wms. 459, n.

interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity with respect to the wife; and accordingly, though it has been much agitated, and is not yet, perhaps, perfectly determined whether a particular assignee be liable to make a provision for the wife out of her fortune, it has been long settled, that assignees under a commission of bankruptcy, coming into a court of equity to reduce the interest of the wife into possession, are bound to make such a settlement as the husband would in the same case have been compelled to make; but if the assignment has the effect of reducing the wife's interest into possession" (the argument in that case had been that the assignment had that effect), "how could this equity ever have prevailed? Out of that of which the husband has obtained possession no settlement can be compelled. If the assignment, therefore, put the assignees in possession, it would completely extinguish all the claims of the wife, as the possession of the husband himself certainly does. They ought, on that principle, to be considered as coming here to claim what had by the assignment ceased to be a trust for the wife, and become wholly a trust for the creditors. But the Court considers the assignment as doing nothing more than to place the assignees in the room of the husband." He therefore held, that, by the bankrupt law as it then existed, the assignment of the commissioners in bankruptcy had no such effect as was there contended for on behalf of the assignees. The assignees simply represented the husband. They could not reduce the property into possession without the assistance of the Court, any more than the husband could have done so; and coming here for that assistance, the Court imposed on them the condition on which alone it would have assisted the husband to obtain the possession.

1858.
IN RE BARR'S
TRUSTS.
—
Judgment.

Now that corresponds precisely with the observations of

1858.
IN RE BARR'S
TRUSTS.
Judgment.

Lord *St. Leonards* in *Re Atkinson* (a), where he says, "It may be considered as decided, that the assignee in insolvency represents the insolvent; he stands in his place, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound. It has, however, been contended that the effect of the Act is, so to vest the property that the insolvent cannot afterwards divest it. But this is not so, for there are no words in the Act giving to the assignee any higher interest than the insolvent himself has. The assignee does not, therefore, take so as not to be subject to equities as administered in this Court." In fact, taking the same view with respect to the Act for the Relief of Insolvent Debtors as that taken by Sir *William Grant* (in reference to a different branch of equity as administered in this Court,) with respect to the Acts which then regulated the law of bankruptcy, viz. that assignees under a commission stand in no higher position than the bankrupt himself, and must be subject to all the rules by which equitable rights are administered in this Court.

The Act for the Relief of Insolvent Debtors (b), upon which Lord *St. Leonards* was then reasoning, appears to me to be quite as strong in reference to this question as the Acts by which the law of bankruptcy was regulated when this bankruptcy occurred. It comprises all the property of the insolvent in the largest terms. By the 11th section, the insolvent, at the time of subscribing his petition, is to execute a conveyance and assignment of all his estate, right, title, interest, and trust, in and to all his real and personal estate and effects, both within this realm and abroad (except his wearing apparel and the other things excepted, not exceeding the value of 20*l.*), and of all his future estate, right, title, interest, and trust in or to any real or personal estate and effects, within this realm or abroad, which he may purchase, or which may revert,

(a) 2 D. M. G. 143.

(b) 7 Geo. 4, c. 57.

descend, be devised or bequeathed, or come to him. And such conveyance and assignment shall vest all his real and personal estate and effects, and all such future real and personal estate and effects as there mentioned, of every nature and kind whatsoever, and all such debts as there mentioned, in the provisional assignee; with a proviso making the assignment void in case the petition shall be dismissed (a). So that, in truth, the whole of the property of the insolvent is vested, in the largest words, in the assignee in insolvency. Nor is it possible, as it appears to me, to give to those words any other effect than to the words occurring in the Acts now in question with reference to the law of bankruptcy, or to draw any distinction for the present purpose between the two enactments. And, as to the argument which was advanced on behalf of the present assignees, that in insolvency the assignment is voluntary, whereas in bankruptcy the proceedings are in invitum, I cannot for a moment attach any weight to that distinction.

1858.
IN RE BARR'S
TRUSTS.
Judgment.

The reasoning of the Master of the Rolls in *Dearle v. Hall* (b), applies as fully and forcibly to an assignee in bankruptcy as to an assignee for valuable consideration. "If," he says, "you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary, for against him the title is perfect without notice." This, I may observe in passing, explains what Lord Justice *Turner* says in *Bartlett v. Bartlett* (c), in reference to *Ex parte Newton* (d), that, in that case, the Court of Bankruptcy appears to have proceeded on a mistaken supposition that the assignment to the bankrupt passed nothing without notice to the trustee. "But if he, availing himself of the possession as a means of obtaining

(a) 7 Geo. 4, c. 57, s. 11.
(b) 3 Russ. 24.

(c) 1 De G. & Jones, 143.
(d) 4 D. & C. 138.

1858.
 IN RE BARR'S
 TRUSTS.
 Judgment.

credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up; and you have permitted another to obtain a better title to the legal possession. What was done by *Dearle* and *Sherring* did not exhaust the thing (to borrow the principle of the civil law), but left it open to traffic. These are the principles on which I think it to be very old law that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession must take his chance" (a). Now it is settled that a mere assignment of an equitable interest is not tantamount to possession; and that what is necessary to give to the assignee of an equitable interest a right tantamount to possession, is notice of the assignment.

I will now advert to the second point contended for on behalf of the assignees—viz. that, if notice were necessary, the commission of bankruptcy was notice to all the world. Now, as to this particular case, the point is settled by the decision in *Sowerby v. Brooks* (b). There a debt due to a bankrupt before his bankruptcy was paid to the bankrupt himself after the issuing of the commission, but before the party paying had any actual knowledge of the bankruptcy. The question was, whether the issuing of the commission was, in law, to be deemed notice to a debtor so paying his debt; and the Judges determined that it was not. They were of opinion, that, in the case before them, the issuing of the commission was not notice in point of law (c). And clearly it must follow, upon the same principle, that if the trustees in the case now before me had paid the fund in question to the Petitioner, without actual

(a) 3 Russ. 24.

(b) 4 B. & Ald. 523.

(c) Id. 534.

knowledge of the bankruptcy, they would have been protected by the decision in *Sowerby v. Brooks*.

1858.
IN RE BARR'S
TRUSTS.
Judgment.

This brings me to the third question raised on behalf of the assignees, viz. whether the trustees had actual knowledge or notice of the bankruptcy. As to that, the facts are these: the bankruptcy took place in 1810. The indenture of assignment under which the Petitioner claims was executed by the bankrupt in 1818. Notice of that assignment was immediately given to the trustees. An attested copy of the indenture was at the same time delivered to them, and that attested copy was subsequently found in the possession of the last surviving trustee. The trustees, therefore, had full notice of that assignment, and there is nothing to lead to the inference that they had any previous notice of the bankruptcy; on the contrary, the facts in evidence would lead to the inference that they had no such notice.

But now the bankrupt files an affidavit, in which he says this: that, in the year 1811, forty-seven years ago,—and observe, he is speaking simply from memory, and I have only his word for it, unsupported by a single scrap of documentary evidence—‘In 1811,’ he says, ‘*Kemble*, one of the trustees, and one who was living when notice was given of the assignment of 1811,’ (I inquired whether he was then living, because *Timson v. Ramsbottom* (a) shows, that, if he had not been then alive, this evidence would have been simply immaterial), ‘was aware that I was a bankrupt, he was my intimate friend at the time, and I consulted him with reference to my bankruptcy, and took his opinion and advice as to the course I should adopt. He was then aware of the bankruptcy, and, being aware of it, he promised to assist me with money to establish myself in business.’ And then he goes on to depose how *Kemble* lent him 600*l.*

(a) 2 Kec. 35.

1858.
 IN RE BARR'S
 TRUSTS.
 Judgment.

with which he purchased the leasehold premises sold by the direction of his assignees, and how that 600*l.* was secured upon the lease and the premises therein comprised.

Now, as to the character of that notice, there are some observations not undeserving of consideration in the case of *Ex parte Carbis In re Croggon*, reported in a note to *Ex parte Watkins In re Kidder* (a). The petition in *Ex parte Carbis* was presented by the assignee of a policy of assurance, and prayed to have the policy delivered up to the Petitioner. It appeared, that, after the bankrupt had delivered the policy to the Petitioner, the latter sent his agent to the office to pay the premium, and "in the course of conversation," the agent informed the clerk that the bankrupt had assigned the policy to the Petitioner. The question was, whether that was sufficient notice to the office of the assignment. Mr. *Swanston* contended that the slightest circumstance of notice was sufficient. The Chief Judge then asked this question: "Taking it for granted that a verbal notice is enough if given as a notice, is it enough if said in a mere conversation, in which the party did not intend to give notice?" Counsel having referred in reply to *Ex parte Stright* (b), where a letter not intended as a notice was held sufficient, the Chief Judge, after distinguishing that case, said:—"No conveyancer would advise that a title could be accepted, which was effected with such a notice as the present." Then he mentions the case of *Smith v. Smith* (c), not then reported, which he considered as differing from the case before him, and says: "In notices, the purposes for which they are given must be considered. In this case, it is a question of fact whether or not the letter did contain any notice." (It had been alleged at the bar that a

(a) 1 Mont. & Ayr. 693, n.

(b) Mont. 502.

(c) 2 Cr. & Mee. 231.

letter had been sent containing notice, but the letter was not in evidence). "The letter is not before the Court. Then, independently of the letter, here is a mere accidental conversation, in the course of which it slips out that the policy was deposited. The clerk at the insurance office would not notice this, as it was not intended as a notice." Then Sir *John Cross* says, "If a man walks into a banker's and says accidentally that a bill is dishonoured, that is not notice. . . . [In this case] the fact of a deposit was a mere matter of conversation, and alike amounts to nothing, whether that conversation took place in the office, in a house, or in the streets." And Sir *George Rose* takes the same view: "It is not necessary such notice should be formal, nor is it necessary that it should be in writing; but it must be a distinct notice."

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IN RE BARR'S
TRUSTS.
Judgment.

I should say, that in *Ex parte Watkins* (a),—the principal case, to which that of *Ex parte Carbis* is appended as a note—it was held that the mere circumstance of its being well known to a director of an insurance company, and to the actuary of the company, that certain shares in the company standing in the name of the bankrupt were in fact the property of another, was sufficient notice to prevent reputed ownership; but the Court above reversed that decision (b), holding that it was not sufficient.

In the present case the conversation, the effect of which is in question, takes place not between the assignees in bankruptcy and the trustee. Had it taken place in that way, it might possibly have raised a different question. But it takes place (if I am to believe this testimony), between the bankrupt himself and his trustee. And even if I gave full weight to the testimony of the bankrupt on this subject, I should be inclined to hold—

(a) 1 Mont. & Ayr. 689.

(b) 2 Id. 348.

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TRUSTS.*Judgment.*

although I should take more time to consider the point than is now necessary to bestow upon it, disregarding as I do the whole of the bankrupt's evidence on this subject,—that communications such as those which he deposes to have passed between himself and his trustee relative to his bankruptcy, and such knowledge as he deposes his trustee to have had of that bankruptcy, do not constitute such notice of the rights of the assignees in bankruptcy, as to give them priority over the subsequent indenture of assignment, of which formal notice was duly given, and under which the Petitioners claim to be entitled.

But I do not stay to inquire into that question, because in this case I adhere to the rule which I always wish to observe in cases like the present, where any question of fact depends upon the testimony of a single witness, and any inconsistency is apparent between such testimony and the previous conduct of the witness, viz. that the Court should look rather to the acts done by him at the time, than to his statements when called as a witness. And when, as here, a witness professes to speak to what occurred forty-eight years ago, and to the knowledge which a person then possessed who has been dead for six-and-thirty years, and that witness, in order to make out the truth of what he now deposes, is compelled to admit, that, by the deed which he executed in 1818, and upon the faith of which he put 1000*l.* into his pocket, he grossly defrauded the party in whose favour that deed was executed, if what he now says is true; the question being, whether, upon the unsupported evidence of such a witness, I am to take away a right which the witness professed to assign, and which the assignee believed to have been effectually assigned, as far back as the year 1818, it appears to me that my answer should be, I will not believe in the dishonesty of the witness in the year 1818. I will rather believe that he act-

ed honestly then, and that what he now deposes to have occurred at the time of his bankruptcy is untrue.

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TRUSTS.
Judgment.

I therefore hold, that the title is in the Petitioners claiming under the assignee for value by virtue of the indenture of 1818; and the order will be according to the prayer of the petition.

Ordered accordingly.

SWANZY v. SWANZY.

March 24th.

MOTION that Plaintiff should give security for costs.

Practice—Bill
by Foreigner—
Security for
Costs—Laches.

The Plaintiff was described in the bill as *Catherine Swanzy of Cape Coast Castle* on the western coast of *Africa*, at present residing at a given address in *Pimlico*, in the county of *Middlesex*.

Where it is not clear upon the face of the bill that Defendant is entitled to security for costs, Defendant, by applying for further time to answer, does not waive any right that he may have to such security upon grounds dehors the bill, and not discovered by him when he applied for further time, although they might have been so discovered had he made inquiry.

It appeared that the bill was filed on the 2nd of January, 1858; and that, since the filing of the bill, the Defendants had taken out a summons for further time to answer the Plaintiff's interrogatories. This summons was attended before the Chief Clerk on the 11th of March.

A clerk of the Defendants' solicitor, by his affidavit in support of the motion, deposed, that on attending before the Chief Clerk to support the summons, a clerk of the Plaintiff's solicitors, in the course of his remarks in opposi-

Plaintiff, described in bill as of *Africa*, now residing at a given address in *England*, ordered, under the circumstances, to give security for costs, notwithstanding Defendant had applied for further time to answer, and might, before making that application, have ascertained the facts on which the order was made.

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Statement.

tion to the application, and in answer to a question put by the Chief Clerk as to the particular reason for opposing it, said, that the Plaintiff was an *African* lady; that she had come to this country for the purpose of asserting her rights in reference to the matters mentioned in the bill; and that she would return to *Africa* as soon as the suit was disposed of; also, that her health was suffering from the climate of this country, which did not agree with her.

Another clerk of the Defendants' solicitor, by his affidavit, deposed, that on the 12th of March, 1858, he made inquiries respecting the Plaintiff at the address in *Pimlico*, when he was informed that no such person as Mrs. *Swanzy* had ever resided there; but, on his saying that Mrs. *Swanzy* was a coloured lady, he was informed that a coloured lady of the name of *Hughes* had resided there with her husband a short time previously, but only for about a week; that she had taken her lodgings only as a weekly tenant, and that it was not known where she had gone to reside. This deponent further stated by his affidavit, that, from information received from another quarter, he had reason to believe that the Plaintiff was residing at an address in *Brompton* under the name of *Hughes*; and he therefore went, on the 12th of March, to that address, when he was informed by a servant of the house, that a coloured lady named *Hughes* resided there with her husband, and had been there for about a fortnight, and that they had taken the lodgings as weekly tenants only.

On the following day, (the 13th of March), the Defendants gave notice of motion.

Argument.

Mr. *C. T. Simpson*, in support of the motion, contended that, the Plaintiff's habitual residence being abroad, the mere circumstance of her having, when the bill was filed,

a lodging in this country, did not exempt her from the ordinary liability of a foreigner to give security for costs. For anything that appeared to the contrary, she might have taken lodgings within the jurisdiction, for the express purpose of avoiding the necessity of giving such security; and where that was the case, where the residence in this country was merely colourable, the rule applied precisely as if there were no such residence: *Ainslie v. Sims* (a). The question in all such cases was, whether the Defendants had a fair and reasonable chance of finding the Plaintiff, if wanted, to answer the process of the Court. Here they clearly had not, and the further circumstance of the Plaintiff's subsequent change of abode, (as to which see *Player v. Anderson* (b),) and her living at both abodes under a name different from that by which she was described in the bill, were additional reasons for requiring her now to give the usual security.

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Mr. *Erskine*, for the Plaintiff, opposed the motion.—By applying for further time the Defendants had waived any right they might otherwise have had to security for costs. At the outset of the suit they had notice by the bill that the Plaintiff was habitually resident out of the jurisdiction; and where that is so, a Defendant should apply at once before answer, or time prayed to answer, otherwise his right is waived: *Meliorucchy v. Meliorucchy* (c). In *Murrow v. Wilson* (d), where the Defendant had merely resisted a hostile motion on the part of the Plaintiff, the latter was ordered to give security; but here the Defendants had “originated proceedings of their own:” and that distinction was expressly taken by Lord *Langdale*, M. R. (e).

The VICE-CHANCELLOR.—Was there a clear right in these Defendants upon the face of the bill? was it clear

(a) 17 Beav. 58. (b) 15 Sim. 104. (c) 2 Ves. sen. 24.

(d) 12 Beav. 497. (e) Ibid.

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 v.
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 —
Argument.

upon the face of the bill that they had a right to security for costs? In the case you first cited there was ; but where that is not so, does not the right arise when the Defendants first discover the facts?

Mr. *Erskine*.—But here there has been no bonâ fide inquiry as to the facts, otherwise they would have been discovered much earlier. More than two months were allowed to elapse before the Defendants applied for further time, and during the interval they must have known, or might have known, and must therefore be taken to have known, all the circumstances on which they now rely. After such laches this motion should be refused.

The VICE-CHANCELLOR (to Mr. *Simpson*).—My doubt is, whether, upon the authority of *Ainslie v. Sims* (a), you were not put at once, immediately the bill was filed, upon inquiry to ascertain whether the Plaintiff's alleged residence in this country was a real or only a colourable residence. If you were, then you must be taken to have known the facts on which you now rely, as soon as you might have discovered them by making such inquiry.

Mr. *Simpson*.—In *Ainslie v. Sims*, that question did not arise ; and in *Player v. Anderson* (b), no such inquiry was held to be necessary.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have no doubt as to the rule laid down by the old authorities,—and, indeed, it is but justice so to hold,—that, if upon a bill being filed by a person residing out of the jurisdiction of this Court, and stating himself by his bill to be residing out of the jurisdiction of this Court, the

(a) 17 Beav. 57.

(b) 15 Sim. 104.

Defendant, instead of applying at once for security for costs, takes active steps in the suit,—for instance, by putting in his answer, or by moving for further time to answer,—he thereby waives his right to such security ; nor is that inconsistent with Lord *Langdale's* judgment in *Murrow v. Wilson*(a), where he expressly distinguishes between the case of a Defendant simply resisting, as there, an adverse motion made by the Plaintiff, and cases where, as here, the Defendants have “originated proceedings of their own.”

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 Judgment.

But in this case the bill alleges a residence in this country, and the question is, whether, having regard to that circumstance, I am to hold that the Defendants ought necessarily to have known, and to treat them as if they had in fact known, the circumstances on which they now rely, at the time when they might first have discovered those circumstances had they made inquiry.

In *Ainslie v. Sims*, the Master of the Rolls expressly guards himself against being supposed to say, that in every case in which a suit is instituted by a foreigner, having a temporary residence in this country, he may be compelled to give security for costs; nor has any authority as yet gone further than this, that, where it is clear upon the face of the bill, or where the Defendant, before taking any active step in the suit, is aware that the Plaintiff can be compelled to give security, there the Defendant waives his right to such security by taking any active step in the suit, of the kind I have described. No authority has yet gone so far as to decide, nor would it be reasonable to hold, that where this is not the case, a Defendant, by taking such active steps in the suit, waives any right that he may have on grounds dehors the bill, merely because he might have discovered those grounds before such steps were taken.

(a) 12 Beav. 497.

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 Judgment.

The true test, I apprehend, is this:—Could the Defendant, upon the statements in the bill, and without proof by affidavit or otherwise of any circumstance dehors the bill, have compelled the Plaintiff to give security? If he could not,—if there was any further circumstance to be proved, for instance, as the Master of the Rolls puts it in *Ainslie v. Sims*, the circumstance that the Plaintiff is merely on a visit, that he is at an inn, or that he has taken lodgings from week to week,—I am not prepared to say that the Defendant was bound to ascertain that circumstance at the earliest time at which it could be discovered by him, or that he waives his right to security for costs, if before making such inquiry he takes some active step in the suit.

In the present case, what actually put the Defendants upon making inquiry, appears to have been this: On attending the summons for further time on the 11th of March, they learned from the Plaintiff's solicitors, that she had come to this country for the purpose of asserting her rights, and meant to return to *Africa* as soon as the suit was disposed of, and that her health was suffering from the climate of this country. Upon that, inquiry is made at the address given in the bill as the Plaintiff's residence in this country; and it is ascertained that she had been residing there for about a week, but under another name, and as a weekly tenant, and it was not known where she had gone to reside; and at last she is found to be living at another address as a weekly tenant, and—what weighs very much with me in the view I take—under a different name from that by which she is described in the present bill.

Taking all these circumstances together, I think I ought to order the Plaintiff to give security for costs.

Ordered accordingly.

1857.

HAYTER v. TUCKER.

THE testator in the cause bequeathed his residuary personal estate to trustees, upon trust for a charity.

Part of the residuary personal estate consisted of shares in certain mining companies conducted on the cost-book principle, and called respectively the *Herod's-foot*, the *East Bassett*, the *Wheal Sidney*, the *Wheal Uny*, the *Boscean*, and the *North Buller* Mining Companies.

Upon the cause now coming on for further consideration a question arose, whether a sum of 162*l.* 10*s.* arising from the sale of these shares, was to be considered as pure personalty, so as to pass to the charity; or whether the bequest was rendered void by the Statute of Mortmain, 9 Geo. 2, c. 36, to the extent of that sum.

The Chief Clerk by his certificate had included the sum in question in a larger item, described in his certificate as "cash arising from leasehold estate, mortgages, or chattels real."

Mr. *De Gex* appeared for the Plaintiff.

Mr. *Willcock*, Q. C., and Mr. *Schomberg*, for the next of kin, contended that the bequest was void, to the extent of the sum in question.

The shares which that sum represented, were clearly an "interest in lands, tenements, or hereditaments," within the meaning of the Act 9 Geo. 2, c. 36. They were not shares

July 27th, 28th,
& Aug. 1st.

1858.
Jan. 26th.

Mortmain—
9 Geo. 2, c. 36
—*Mining Com-*
pany on Cost-
book Principle
—*Bequest of*
Shares in, to
Charity—
Wills.

Shares in Mining Companies conducted on the cost-book principle—*Held*, not within Stat. of Mortmain, 9 Geo. 2, c. 36, the mines being vested in trustees for the purposes of the undertaking generally, and not in trust for the individual shareholders; and the interest of the shareholders being limited to the profits derived from working the mines.

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28th.

Argument.

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 —
Argument.

in companies formed for ordinary trading purposes, and holding land incidentally as the necessary means of carrying out those purposes. The only property these companies possessed was mines and minerals; in other words, the very soil itself.

Watson v. Spratley (a) would be cited contra; but, in that case, it was admitted by Mr. Baron *Parke*, that where, as here, real property is vested in the purser of the mine or any other person in trust for the co-adventurers, in proportion to their shares, it is a direct trust of the realty, and the shares are an interest in land.

Mr. *Rolt*, Q. C., and Mr. *Busk*, for the trustees of the charity, contended that the proceeds of the shares were pure personalty, and passed to the charity.

The VICE-CHANCELLOR.—One way in which they would put their case, is this: Suppose three or four persons only to constitute a company of this kind, and each to leave all his share, estate, and interest to a charity; the charity, they would argue, becomes the owner of the mine.

Mr. *Rolt*, Q. C.—Not of the mine, but simply of the profits of the undertaking. The charity would stand precisely in the position of the adventurers; and in no one of the companies now in question have the adventurers any interest in the mine, or in the minerals until severed from the mine. The whole value of the minerals so severed is paid in the shape of royalty to the proprietor of the soil, the shareholder taking nothing but what represents the profits of his capital as invested in machinery and labour.

It is true the purser has a let or grant of the mine, but he holds the mine and machinery not in trust for his co-

(a) 10 Exch. 222.

adventurers, but in trust to employ the machinery in working the mine and making the most profit of it for their benefit, the co-adventurers sharing the profit only, and having no right to call for any part of the soil. Shares in such companies have been expressly held not to be "an interest in land" within the 4th section of the Statute of Frauds: *Watson v. Spratley* (a), *Powell v. Jessop* (b), and *Walker v. Bartlett* (c). And if so, they are not "an interest in lands, tenements, or hereditaments," within the Act 9 Geo. 2, c. 36.

They cited also *Myers v. Perigal* (d), *Attorney-General v. Giles* (e), *March v. The Attorney-General* (f), *Sparling v. Parker* (g), and *Edwards v. Hall* (h).

Mr. Willcock, Q. C., replied.

The VICE-CHANCELLOR.—(The question having stood over for further information, which was not produced):—

It is clearly settled, that shares in any company or trading partnership, incorporated or not incorporated, holding land for the purposes of their undertaking, whether as an investment of capital, as in *Myers v. Perigal*, or as a means for erecting their warehouses, engines, or the like, are not necessarily on that account an interest in land within the meaning of the Statute of Mortmain of the 9 Geo. 2, c. 36.

The whole question in the case of each of these mining companies is, how the mine is held, whether it is held upon trust for the individual shareholders, so that each indi-

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| (a) 10 Exch. 222, 245. | <i>S. C.</i> , 5 Law J., N. S., Ch., 44. |
| (b) 18 C. B. 337. | (f) 5 Beav. 433. |
| (c) Id. 845. | (g) 9 Id. 450. |
| (d) 11 C. B. 90; <i>S. C.</i> , 2 D. M. G. 599. | (h) 11 Hare, 1; <i>S. C.</i> , on appeal, 6 D. M. G. 92. |
| (e) Shelford on Mortmain, 987; | |

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HAYTER
v.
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—
Argument.

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—

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Argument.

vidual shareholder has a direct interest in the mine itself, or whether the interest of the shareholders is limited to the profits arising from the working of the mine.

If the interest of the shareholders is limited to the profits arising from the working of the mine, then it would seem clear, from the authorities cited, *Watson v. Spratley* (a), *Powell v. Jessop* (b), and *Walker v. Bartlett* (c), that the shares are not an interest in land within the Mortmain Act; but if the shareholders have a direct interest in the mine itself, then, according to one of those authorities, *Watson v. Spratley* (a), it would seem clear that the shares are an interest in land within the meaning of the Act.

The question, to which class these mines belong, is one which, upon the facts before me, I find it impossible to determine, the shares being called on the one side "shares in the mines," on the other, "shares in the undertakings." And although *Powell v. Jessop* (b) has decided, that, in the absence of evidence to the contrary, there is a presumption that shares in a mining company conducted on the cost-book principle are not an interest in land; still, in this case, I have the Chief Clerk's finding, that these particular shares are of a kind that would bring them within the Statute of Mortmain, and, in the face of that finding, I cannot decide to the contrary without further inquiry.

Statement
resumed.

The cause having stood over generally, inquiry was made as to the constitution of the several mining companies, and affidavits were filed by the pursers and others acquainted with the facts, by which it appeared, that, in the case of each company, a lease was granted either to the purser or to

(a) 10 Exch. 222.

(b) 18 C. B. 337.

(c) Id. 845.

three or more members of the company, for a term of years ; such lease being a grant for a term of years of the liberty to dig, work, and search for minerals within the mine, rendering to the grantor an aliquot part of such minerals, terminable in the event of the mine not being diligently worked: the rest of the minerals, as soon as wrought or broken from the soil but not previously, belonging to the company.

In no case was there any express trust or declaration on the face of the grant to show that it was held in trust for the shareholders of the company.

In the case of all the companies, it was deposed, that the shareholders took no interest in the substance of the mine itself as land, but only in the minerals when severed from the land ; so that the interest of each shareholder was confined to a share in the profits, and his liability to the losses of the company, in proportion to the number of his shares ; that no shareholder was entitled to the possession of any portion of the mine, either during the existence of the company or after its dissolution, although the lease might not have expired ; and that, on the dissolution of the company or the abandonment of the adventure, the machinery and effects of the company would be sold, and each shareholder would be entitled to his proportion of the produce, but no interest in the mine itself would remain to be divided among the shareholders.

The argument being now resumed—

Mr. *Busk*, in the absence of Mr. *Rolt*, Q. C., contended, that, having regard to the affidavits, the question of fact, as to which upon the former occasion the Court was in uncertainty, must be decided in favour of the charity.

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Statement
resumed.

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Argument
resumed.

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 HAYTER
 v.
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 —
Argument.

Mr. *Willcock*, Q. C., and Mr. *Schomberg*, for the next of kin, contended that the affidavits showed an interest so connected with land, that, having regard to the large terms of the Statute 9 Geo. 2, c. 36, the shares in question could not be given by will for charitable purposes; citing *Negus v. Coulter* (a).

Curling v. Flight (b) was also cited.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have no difficulty in disposing of this case now that the evidence is before me, the authorities being clear as to the principles by which my decision should be guided.

In *Bligh v. Brent* (c)—the case of the *Chelsea Waterworks*—it was held by the Court of Exchequer, and the decision has been followed in several other cases, that the shares of an *incorporated* company, having power to hold land for the purposes of trading, could not be considered as an interest in land within the meaning of the Statute of Frauds, the land being held by the corporation not the individual shareholders, and held by them not in trust for the individual shareholders but for the benefit of the corporate body, so that the individual shareholder would never have power to call for any part of the land itself, but only for his share of the profit derived from it in carrying out the purposes of the undertaking.

That being the law as to incorporated companies, the question arose as to companies or partnerships not incorporated. It was clear, that, in the case of a company or part-

(a) 1 Amb. 367. (b) 2 Phill. 613. (c) 2 Y. & Coll. 268.

nership not incorporated, land might be held in trust for the individual shareholders; and shares in a company or partnership of that description, it was said, must be looked upon as an interest in land, for there the individual shareholder would have power to call upon the trustees not merely for his share of the profits, but for part of the very land itself, which in an incorporated company was not the case.

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TUCKER.
Judgment.

That is the distinction clearly taken in *Watson v. Spratley* (a), where Mr. Baron Parke sums up the law in these words:—"The principle on which this case should be decided is perfectly clear, and the only doubt felt by any member of this Court is upon a question of fact—namely, under which class of decided cases this particular case falls. In the case of joint-stock companies incorporated by Acts of Parliament, who are generally possessed of land, the individual shareholders are quite distinct from the corporation. The shareholders are entitled to no direct interest in the land; no part of the realty is held in trust for them; but all they are entitled to is, that the real and personal property held by the corporation should be used by them for their benefit, so as to make profits, which, when made, are to be divided between them rateably according to their number of shares, as personalty, which might be disposed of by an attested will (before the late Statute of Wills), and, consequently, could have been disposed of by parol." Then, after referring to *Bligh v. Brent* (b), and *Hilton v. Giraud* (c), in support of that proposition, he proceeds thus:—"Nor is it to those cases only of joint-stock companies which are incorporated, and in which, therefore, the corporation is seised of the real estate, that this doctrine is applicable. It applies, also, to other joint-stock companies, where the persons seised of the realty hold in the same way as the corporation in those cases, that is, in trust only to

(a) 10 Exch. 222. (b) 2 Y. & Coll. 268. (c) 1 De G. & Sm. 187.

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 ———
Judgment.

use the land to make profits as part of the stock in trade, and then to divide those profits between the shareholders, whose only interest is in those profits. The cases decided under the Mortmain Act are of this nature. That of *Sparling v. Parker* (a) was one. . . . It was there held, that shares in an unincorporated gas light company, where the lands are expressly stated to be vested in trustees" (that is, for the company, and not for the individual shareholders), "and the shares are declared to be personal estate by the partnership deed, were personalty. So, shares in a dock, where the shareholders were interested in the profits and losses. In whom the real estate was vested, does not appear by the report; but, doubtless, not in each partner, but in some one or more trustees. In like manner, shares in a banking company, where the shareholders were entitled to the profits only, and the real estate was vested in trustees, were held not to be within the Mortmain Acts, first, by the Court of Common Pleas in *Myers v. Perigal* (b), and confirmed by Lord *St. Leonards* (c)." Then he comes to the distinction taken in the argument of this case on behalf of the next of kin:—"In the case of *Baxter v. Brown* (d), where there was a fulling mill held by trustees for the copartners under a partnership deed, the Court, on the construction of that deed, held that there was a trust of the real estate for each copartner, and each copartner was held to be entitled to vote. Lord *St. Leonards* (c), evidently, is dissatisfied with that decision; but if the construction of the trust was correct, and there was a direct trust of the real estate for each partner in proportion to their shares, the decision was, no doubt, perfectly right (e)."

Therefore, if I had found, in the case of any of the mining companies now in question, that the mine was

(a) 9 Beav. 450.

(b) 11 C. B. 90.

(c) 2 D. M. G. 599.

(d) 7 Man. & Gr. 198.

(e) 10 Exch. 244, 245.

vested in the purser or any other person, in trust not for the purposes of the undertaking generally, but for the individual adventurers in proportion to their shares, then I should have been bound to hold those shares to be an interest in land within the meaning of the Mortmain Act. But if I find, as I do find in all the companies now in question, that the mines are vested in trustees for the purposes of the undertaking generally, and not in trust for the individual adventurers, no individual adventurer can call for any part of the soil, or any thing more than his share of the profits when realised. And if shares in such companies be given to a charity, it is clear, in like manner, that all the charity will ever be able to call for is a proportional part of the profits.

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HAYTER
v.
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—
Judgment.

There is, therefore, no possibility of any violation of the Mortmain Law in the event of my holding that such shares can pass by will to a charity; and it is clear to me, that, in the present case, the charity is entitled to the fund produced by the sale of the shares.

DECLARE the 162*l.* 10*s.* to be pure personal estate, and correct the Chief Clerk's certificate accordingly.

*Minute of
Order.*
—

1858.

March 25th &
26th.

*Will—General
Bequest—Ex-
ercise of Pow-
er of Appoint-
ment—1 Vict.
c. 26, s. 27.*

By a marriage settlement, leaseholds were settled upon trust for wife for life for her separate use, and after her decease upon trust as husband should by deed or will appoint, and subject thereto upon trust for such person, &c., as under the Statutes of Distribution might be entitled thereto. The husband by his will in 1850, after making certain provision for his only child, as to all other his estate, property, and effects whatsoever and wheresoever, which he should be possessed of, interested in, or entitled to at his decease, subject, as to

HUTCHINS v. OSBORNE.

A SPECIAL case.

By an indenture, dated 1836, being the settlement executed in contemplation of the marriage of *John Hutchins*, deceased, and *Maria* his wife, then *Maria Ward*, spinster, certain leasehold property was limited upon trust to pay the rents to *Maria* and her assigns during her life for her separate use, and after her decease "upon trust for such person or persons, for such estates and interest, and in such manner and form, and to and for such ends, intents, and purposes in all respects, as the said *John Hutchins* should, by any deed or instrument in writing, or by his last will and testament in writing, to be by him legally executed, direct, limit, or appoint, give or bequeath the same, and in the meantime, and until, or in default thereof, and subject thereto, if any, upon trust for such person and persons as under the Statute for Distribution of intestate estates might be or become entitled thereto (*sic*)."

John Hutchins by his will in 1850, after directing payment of his debts and giving several legacies, and making certain provision for his only child *Silas Hutchins* (as therein mentioned), proceeded as follows:—"And as to all my ready money, money in the stocks or funds, debts, securities for money, household furniture, plate, linen, china, my leasehold messuage or tenement and premises, No. 7, *Carter-street* (a), and all other my estate, property, and

such parts thereof as were comprised in the settlement, to that settlement and the trusts thereby declared, and which indenture he thereby ratified and confirmed in all respects, gave and bequeathed the same to his widow absolutely.—Held, that the general residuary bequest operated as an execution of the power of appointment reserved by the settlement.

(a) This house was not comprised in the settlement.

effects whatsoever, which I shall or may be possessed of, interested in, or entitled unto at my decease, subject to the payment of the before-mentioned legacies, and also subject, as to such parts thereof respectively as is or are comprised in an indenture of settlement and assignment dated the 15th day of July, 1836, made on or previous to my marriage with my said wife, to the said indenture and the trusts thereby declared, and which indenture I hereby ratify and confirm in all respects, I give and bequeath the same and every part thereof to my said wife, her executors, administrators, and assigns absolutely."

1858.
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Statement.

The testator died in 1850, leaving *Maria* his widow, and *Silas* his only child, him surviving.

Silas died intestate in 1853, leaving the Plaintiff, his widow and administratrix, and three children him surviving.

The question for the opinion of the Court was, whether the general residuary bequest to *Maria* operated as an execution of the power of appointment reserved by the settlement.

Mr. *W. A. Clark*, for the Plaintiff, contended that the bequest did not operate as an execution of the power of appointment.

Argument.

The bequest is expressly "subject to the settlement and the trusts thereby declared." And that settlement is expressly "ratified and confirmed in all respects" in the very clause containing the bequest. Those circumstances amount to a clear indication of intention on the part of the testator that his will should not operate as an execution of the power. And, even under the recent Act (*a*), a general de-

(a) 1 Vict. c. 26.

1858.
 HUTCHINS
 v.
 OSBORNE.
 —
Argument.

vise or bequest does not include property over which the testator has a power of appointment, where a contrary intention appears by the will (a).

The VICE-CHANCELLOR.—The testator seems clearly to have considered that he was dealing with the property comprised in the settlement, because, after describing the property with which he meant to deal at the commencement of the clause in question, he says, “subject as to such parts thereof respectively as are comprised in the settlement” to that settlement and the trusts thereby declared. According to your contention, he meant to say by that, “I deal with the whole, but subject as to a certain part of it to this proviso: that I don’t deal with that part at all.”

Mr. *W. A. Clark*.—The testator had used large words at the commencement of the clause, and fearing they might affect the settled property, he inserted this,—“subject as to the settled property to the trusts of the settlement.” The effect, therefore, as to so much, is as if he had imported all the trusts of the settlement into the will.

The settlement containing a trust for the testator’s next of kin, can that be revoked by a bequest which is expressly to be subject to the trusts contained in the settlement? Besides, the testator having expressly ratified and confirmed that trust, can there be an implied revocation in the same sentence—an implied revocation in spite of an express confirmation?

The VICE-CHANCELLOR referred to *Lake v. Currie* (b).

Mr. *Sidney Smith* and Mr. *Joseph*, for the children of *Silas Hutchins*, supported the Plaintiff’s contention, and cited the observations of the Master of the Rolls in *Lake v.*

(a) 1 Vict. c. 26, s. 27.

(b) 2 D. M. G. 536, 550.

Currie (a) not affected by the reversal of his judgment by the Court above, to show that the clause in the present will, ratifying and confirming the settlement, was inconsistent with an intention to revoke.

1858.
HUTCHINS
v.
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Argument.

The VICE-CHANCELLOR.—Might not the testator mean this: "Part of the trusts of this settlement I can't disturb; part I can. I disturb them as far as I can; I ratify them where I cannot."

Mr. *Sheffield*, for the personal representatives of *Maria Hutchins*, the testator's widow, contended that the residuary bequest operated as an execution of the power.

Mr. *W. A. Clark* replied.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating the case and the question to be decided), proceeded—

March 26th.
Judgment

The presumption of law under the recent Act (b) is, that a general devise or bequest shall operate so as to pass everything over which the testator has a power of appointing, "unless a contrary intention shall appear by the will."

But beyond that, in a will made before the recent Act came into operation, if such words as these were found: "I give all my estate and effects whatsoever and wheresoever, subject, as to such parts thereof as are comprised in my marriage settlement, to that settlement and the trusts thereby declared," the Court would consider those words as a sufficient indication that the testator meant to deal with the property comprised in his settlement, and meant his

(a) 15 Beav. 476.
VOL. IV.

(b) 1 Vict. c. 26, s. 27.

1858.
HUTCHINS
v.
OSBORNE.
Judgment.

will to operate upon that property, with this only proviso — that the directions with respect to it in his will should be subject to those in his settlement.

Now, if I look to the trusts of the settlement, I find that they are as effectually preserved, and the trusts of the will as effectually subject to them, whether the testator does or does not exercise his power of appointment. Treating the clause in question in the will as an execution of the power, the bequest will be no less "subject to the trusts of the settlement." The words of ratification used in reference to the indenture of settlement, "and which indenture I hereby ratify and confirm in all respects," are easily explained. By that settlement his widow was to have a life interest in the property in question. He says, therefore, as was the case in *Lake v. Currie*, "I do not intend to disturb her life-interest; I intend my will to operate upon the property subject to that life-interest, and subject to that I give the property in this manner:"—the ratification of the settlement amounting so far to this, that, if he could have disputed the widow's life-interest, and made the property liable to his debts to the exclusion of her life-interest, he expressly negatives any intention to do so. The trusts of the settlement were for the widow for life, and, after her decease, for such person as the testator should by will appoint; and he does appoint by his will. In this construction of the will the bequest is as much "subject to the trusts of the settlement" as if no appointment had been made, and the property had been left to go as in default of appointment.

It seems to me, that, by adopting the Plaintiff's construction, I should be forcing the words of the will, that construction amounting in effect to this: that, by subjecting the bequest in his will to the trusts of the settlement, the testator meant to exclude from the operation of his will the entire property comprised in the settlement.

Had there been any reasonable doubt upon the face of the will, I should have looked, as the Court continually does look in such cases, at the state of circumstances existing at the date of the will; but it appears to me, that, in this instance, no reasonable doubt exists. The words the testator has used are too strong for any circumstances to control them.

1858.
HUTCHINS
v.
OSBORNE.
Judgment.

For these reasons I feel bound to hold, that no interest in the property in question passed to the testator's son; but that, upon the face of the will, the whole interest of which the testator had power to dispose passed to his widow.

DECLARE, that the general residuary bequest to *Maria* operated as an execution of the power of appointment reserved to the testator by the indenture of settlement of 1836.

Minute of
Decree.

CLARKE v. FRANKLIN.

BY an indenture, dated 1852, *John Clarke* appointed and conveyed an estate at *Crick*, in the county of *Northampton*, to trustees, to the use of himself for life, with remainder to such uses as he should by deed or will appoint, with remainders over. And by the same indenture he granted and conveyed certain real estate in *Clarendon-square*,

April 22nd
& 23rd.
Deed—Trust
for Conversion
—Resulting
Trust—Real
Estate result-
ing as Person-
alty.

Where real
estate is settled
by deed upon
trust to sell for

certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor, or not until after his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed.

Settlement of real estate by deed (not enrolled) to use of settlor for life, with remainder (subject to a power of revocation, which he never exercised) to use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at settlor's death, and to apply the residue to charitable purposes.—*Held*, following *Hewitt v. Wright* (1 Bro. C. C. 86), that, notwithstanding the trust was not to arise until after settlor's death, the property was impressed with the character of personalty immediately upon the execution of the deed, and the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty.

1858.
 CLARKE
 v.
 FRANKLIN.
 —
Statement.

Leamington Priors, of which he was seised in fee, and assigned two sums of 1000*l.* each secured on mortgage, and certain personal chattels therein mentioned, to trustees: Habendum, after and subject to the same estate for life of the said *John Clarke*, and such power of appointment and revocation therein as was thereinbefore provided and limited respecting the estate and premises at *Crick* aforesaid, unto and to the use of the said trustees, their heirs, executors, administrators, and assigns, according to the tenure, nature, and quality thereof respectively, upon trust to sell and dispose of the said real estate and personal chattels, and receive the purchase money and the said moneys respectively; and after payment of the costs, charges, and expenses incident to and attending such sale, and collecting and calling in the said moneys, to pay six sums of 50*l.* each and one sum of 20*l.* to certain persons named in the indenture, or to such of them as might be living at the death of the said *John Clarke*; and upon trust to pay the residue to the minister, churchwardens, and overseers of the parish of *Crick*, to be by them applied for the charitable purposes in the indenture mentioned.

The indenture was not enrolled pursuant to the provisions of the Mortmain Act, 9 Geo. 2, c. 36.

On the same day *John Clarke* made his will, by which he ratified and confirmed the indenture, and, after making certain pecuniary bequests, he bequeathed all the rest and residue of his personal estate not affected by or included in the indenture, upon trust, after paying thereout all his just debts, funeral and testamentary expenses, to pay the residue to trustees, to be applied and disposed of by them upon such and the like trusts as were mentioned and set forth in the indenture as to and concerning the residue of his real and personal estate therein mentioned.

The testator died in 1855 without issue, and without

having exercised the power of revocation and appointment contained in the indenture of 1852.

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v.
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Statement.

The bill was filed by his widow, and it prayed to have his real and personal estate administered under the direction of the Court, and that the rights and interests of all parties in relation to the real and personal estate comprised in the indenture of 1852 might be ascertained and declared, and the trusts thereof, so far as they were valid, administered under the direction of the Court.

By the decree made on the hearing of the cause, it was declared, that the charitable trusts under the indenture of 1852 were void, so far as regarded the real estate and the personal estate savouring of realty.

The cause now came on for further consideration.

Mr. Rolt, Q. C., and Mr. Lewin, for the Plaintiff, the widow:—

Argument.

By the indenture of 1852, the *Clarendon-square* estate was bound by a trust for sale, and the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the grantor as personal estate, and are applicable and distributable in like manner as the other personal estate of the testator not effectually disposed of by his will. The Plaintiff therefore, as his widow, is entitled to one-half of such proceeds.

This is a trust for conversion out and out. That trust is imperative, for it is clear, that, from the moment of the grantor's death, every one of the seven persons in whose favour the sums of money are charged upon the proceeds of the sale, might have called for conversion. Had the instrument creating the trust been a will, so much of the proceeds as the trust directed to be given to charitable pur-

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 FRANKLIN.
 Argument.

poses, would have resulted to the heir, and would have been personalty in his hands : *Smith v. Claxton* (a), *Wright v. Wright* (b), *Jessopp v. Watson* (c).

The VICE-CHANCELLOR.—That has been repeatedly decided in the case of wills. Whatever is badly given under a trust like this contained in a will, goes to the heir, but as personalty.

Mr. Lewin.—And the same principle applies to deeds. And where, as here, a real estate is granted by deed to trustees and their heirs, upon trust to sell for purposes some of which are good and some bad, whatever is badly given goes to the settlor, but as personalty : *Hewitt v. Wright* (d), *Van v. Barnett* (e), and *Biggs v. Andrews* (f). The circumstance, that the trust to convert is not to be executed until after the grantor's death, is immaterial : *Hewitt v. Wright* (d); and for this reason, that the deed speaks from the time of its delivery. From the moment the deed is delivered, the property in question is impressed with the character of personalty ; and so much of it as is not well given—the expectancy, as it is has been called, of the heir at law, is given to the author of the deed : *Griffith v. Ricketts* (g).

Wright v. Rose (h), which may be cited contra, is distinguishable. That was a mortgage with power of sale, and, the power not having been exercised during the life of the mortgagor, it was held, that the property was real estate.

The VICE-CHANCELLOR.—The way the Vice-Chancellor puts it there, is, that, immediately on the death, the heir was in of the equity of redemption.

(a) 4 Madd. 484.

(b) 16 Ves. 188.

(c) 1 My. & K. 665.

(d) 1 Bro. C. C. 86, 90.

(e) 19 Ves. 102.

(f) 5 Sim. 424.

(g) 7 Hare, 299, 311.

(h) 2 Sim. & St. 323.

Mr. *Pemberton*, for next of kin, supported the Plaintiff's contention.

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Argument.

[The converse case of *Lechmere v. The Earl of Carlisle* (a), and *Ripley v. Waterworth* (b), were also cited.]

Mr. *Evans*, in the absence of the *Solicitor-General*, for the heir at law of the grantor :—

April 23rd.

The heir at law is entitled to the *Clarendon-square* estate, subject only to the charges in favour of the several persons to whom the sums of 50*l.* and 20*l.* are directed by the indenture to be paid at the testator's death.

Admitting that a deed speaks from its delivery, the deed in this case expressly postpones conversion till after the expiration of the grantor's life estate. Upon the true construction of this deed, it is precisely as if the property had been given, and the trusts for conversion declared, by will and not by deed; and had the property been so given, and the trusts so declared, then it is conceded the heir would have been entitled. The heir does not deny that this is a trust to convert out and out, but he contends it is a trust to convert for a purpose which has failed, and where that is so, the intention fails; and this Court regards the author of the instrument as not having directed the conversion: per Lord *Eldon* in *Ripley v. Waterworth* (c).

The VICE-CHANCELLOR.—So far as regards authority, *Hewitt v. Wright* seems to be the very case before me.

Mr. *Evans*.—That case is distinguishable from the present. Here, by no possibility could there be a conversion in the lifetime of the testator.

The VICE-CHANCELLOR.—Is not the principle this, that
(a) 3 P. Wms. 211. (b) 7 Ves. 425. (c) Id. 435.

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 v.
 FRANKLIN.
 —
Argument.

the fact of conversion is one thing, the direction to convert is another. The direction operates, for the purposes of this question, immediately on the delivery of the deed, although the property is not to be converted until after the grantor's death.

Mr. *Evans*.—If that is the decision in *Hewitt v. Wright*, it is opposed to that in *Emblyn v. Freeman* (a). There real estate was conveyed to trustees upon trust, as here, to sell after the death of the grantor, and out of the proceeds of the sale to pay 200*l.* as he should by note appoint. The grantor died intestate, and without making any such appointment, and it was held *pro tanto* a resulting trust for the heir.

The VICE-CHANCELLOR.—That part of the decision was overruled by Lord *Thurlow* in *Hewitt v. Wright* (b); he thought the decision right, that the conversion into money did not prevent its resulting to the grantor, but wrong in giving it to the heir. "He could not help thinking, notwithstanding that case, that the trust of the 1500*l.* resulted" in *Hewitt v. Wright* "in the same manner that it vested in *Wright* the grantor—as personal estate—and so was disposed of by the general terms of the devise" (c).

Mr. *Evans*.—But, in this case, the trusts for conversion not arising until after the death of the grantor, upon the principle of *Griffith v. Ricketts* (d), it is precisely as if the trusts were declared by his will, and the property in question results, as it would do in that case, to the heir at law.

[He cited, also, *Matson v. Swift* (e).]

(a) Prec. Ch. 541.

(b) 1 Bro. C. C. 90.

(c) Id.

(d) 7 Hare, 311, 312.

(e) 8 Beav. 368.

Mr. Willcock, Q. C., and Mr. Erskine, appeared for the trustees, and Mr. Wickens, for the Crown.

A reply was not heard.

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CLARKE
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FRANKLIN.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It appears to me that this point is governed by authority.

Judgment.

The case of *Griffith v. Ricketts* (a) is quite in accordance with the previous authorities. What the Vice-Chancellor there says, is this : "A deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate *from the delivery of the deed*, and, consequently, at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir at law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will ; but the application is different, by reason that the deed *converts the property in the lifetime of the author of the deed*, whereas, in the case of a will, the conversion does not take place until the death of the testator" (b). It is not a question of actual physical conversion of the property from real estate into personal property, but, whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime, or after his death, the grantor, by executing a deed of this description, says, in effect : "From the time I put my hand to this deed, I limit so much of this property to myself as personal property."

(a) 7 Hare, 299.

(b) Id. 311, 312.

1858.
 CLARKE
 v.
 FRANKLIN.
 Judgment.

That is the actual decision in the case of *Hewitt v. Wright* (a). There real estate was limited to the use of the settlor for life, with remainder to trustees, in trust to sell and pay debts and a sum of 2100*l.*, and, after payment of their expenses, to pay and apply the residue as follows: to raise 1500*l.* and pay the interest to *Dorothy Wright*, the daughter of the settlor, till she married, and to pay the principal to *Dorothy* within twelve months after her marriage; and there was a power of revocation. The settlor died without having exercised that power. Then *Dorothy* died without ever having been married, and the trust as to the principal sum of 1500*l.* never having taken effect, the question was, whether that sum was personal estate in the grantor and passed by his will? The Lord Chancellor held that it did. "If," he said, "it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though, in the case of the will, it cannot go to the executor as money, not having been converted, but must descend to the heir; yet he should think that it was personal estate of the heir, and, if he were dead, would go to his executor" (that has since been decided to be the case); "and if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such" (b).

That, therefore, is an express decision, that, notwithstanding the trust for conversion of real estate into personal is not to arise until after the death of the settlor, the property is impressed with the character of personalty immediately upon the execution of the deed, and so much as is undisposed of results to the grantor as personalty.

The doctrine of the converse case of personalty directed by deed or will to be converted into land, is fully discussed by Lord *Eldon* in *Wheldale v. Partridge* (c), where, upon the special terms of the instrument, it was held not to be

(a) 1 Bro. C. C. 86.

(b) Id. 90.

(c) 8 Ves. 227.

one which upon its execution clothed the property with real uses; but Lord *Eldon* said, that, but for those special provisions, and if there had been nothing more in the deed, 'the property would, *immediately upon the execution of the deed*, have been impressed with real qualities and clothed with real uses, and the money would have been land" (a); clearly recognising the rule, that conversion takes effect from the moment of the execution of the deed; and the rights of the parties, and the character in which the property is taken by them, are to be determined according to that conversion.

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v.
FRANKLIN.
Judgment.

The principle of these authorities is therefore clearly settled; and where, as here, real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed.

The only exception is, where the whole of the purposes for which conversion is directed fail from the moment of the delivery of the deed. In *Ripley v. Waterworth* (b), Lord *Eldon* admits, that, where conversion is directed for a particular and special purpose, or out and out, but the produce to be applied to a particular purpose, and the purpose fails, the intention fails, and this Court regards the grantor as not having directed the conversion. So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed,—for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been at home in his lifetime, the Court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate.

(a) 8 Ves. 236.

(b) 7 Ves. 435.

1858.
 CLARKE
 v.
 FRANKLIN.
 Judgment.

And so in *Hewitt v. Wright*, if the only purpose of conversion had been the gift to *Dorothy* on her marriage, and she had been already dead at the date of the deed without having been married, there again the Court would have regarded the grantor as not having directed a conversion.

But here that consideration does not arise. Here some of the purposes for which conversion was directed had not failed when the deed was executed.

It appears to me, therefore, that the property in question resulted to the grantor as personalty.

Minute of
 Order.

DECLARE, that, by the indenture of 1852, the *Clarendon-square* estate, therein comprised, was bound by a trust for sale; and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to *John Clarke*, the settlor, as personal estate, and are applicable and distributable in like manner as the other personal estate undisposed of by his will.

April 23rd.

IN THE SAME CAUSE.

Husband &
 Wife—Dower
 —Uses to bar
 —§ 4 Will.
 4, c. 105.

Dower of a
 woman whose
 marriage was
 since 1 Jan.
 1834:—*Held*,
 following *Fry*
v. Noble (20
 Beav. 598;
S.C., on ap-
 peal, 2 Jur. N. S. 128), not excluded by the ordinary limitations to uses to bar dower in a conveyance before the Act.

A FURTHER question arose at the same hearing, whether *John Clarke's* widow was entitled to dower out of another estate at *Crick*, which descended at his death to his heir at law.

It appeared that the estate in question was purchased by the deceased in 1830, who in that year took a conveyance of the property in the ordinary form to uses to bar dower.

It appeared that the estate in question was purchased by the deceased in 1830, who in that year took a conveyance of the property in the ordinary form to uses to bar dower.

His marriage was not solemnised until after the 1st of January, 1834.

1858.

CLARKE

v.

FRANKLIN.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Lewin*, for the Plaintiff, the widow, contended, that, by the 2nd section of the recent Dower Act(a), the common uses to bar dower contained in a deed executed before the Act were in effect rendered inoperative to bar the right of a widow married since the 1st of January, 1834. It was enough if the husband died beneficially entitled, provided his interest, whether wholly equitable or partly legal and partly equitable, were equal to an estate of inheritance in possession, not being in joint tenancy: *Fry v. Noble*(b).

Mr. *Evans*, in the absence of the *Solicitor-General*, for the heir at law.—The Act provides by the 6th section that “a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him it shall be declared that his widow shall not be entitled to dower out of such land.” And here the whole scope of the conveyance was to prevent the widow from being so entitled.

Mr. *Rolt*, Q. C.—The conveyance in *Fry v. Noble* was at least as strong in that respect; but the Master of the Rolls held, that, even if the 6th section of the Act taken alone would have had a retrospective operation, the 14th section, providing that the Act “shall not give to any deed executed before the 1st of January, 1834, the effect of defeating or prejudicing any right to dower,” prevented that result.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case appears to be exactly the same as that of *Fry* Judgment.

(a) 3 & 4 Will. 4, c. 105.

(b) 20 Beav. 598; S. C., on appeal, 2 Jur. N. S. 128.

1858.
 CLARKE
 v.
 FRANKLIN.

v. *Noble*. The uses are the common uses to bar dower. The point therefore is decided, and the widow is entitled to dower.

*Minute of
 Order.*

DECLARE, that the heir is entitled to the *Crick* estate now in question, subject to the widow's right to dower.

Costs of administration suit out of testator's personal estate: rest of costs out of realty going to the heir, pure personalty, and personalty savouring of realty, according to their values; and let values be put upon them.

April 19th. IN THE MATTER OF EYRE'S SETTLED ESTATES,
 AND OF THE
 ACT TO FACILITATE LEASES AND SALES OF
 SETTLED ESTATES, 19 & 20 VICT. c. 120.

*Practice—Set-
 tled Estates
 Act—19 & 20
 Vict. c. 120—
 Sale under—
 Conveyance to
 be settled by
 Judge—Con-
 veyancing
 Counsel of the
 Court.*

AN order had been made upon Petition in this cause under the Act to facilitate Leases and Sales of Settled Estates (*a*), for the sale of certain lands to raise 118,000*l.*, with a direction that the conveyance should be settled by the Judge.

Where land is sold pursuant to an order of the Court under the Settled Estates Act, 19 & 20 Vict. c. 120, the conveyance must be settled by the Judge, whether the parties differ or not.

Mr. *G. L. Russell* now moved that the order might be varied by inserting, in the direction that the conveyance should be settled by the Judge, the words "in case the parties differ about the same."

The sale would be in upwards of three hundred lots, and serious expense would be incurred if every conveyance were settled by the Conveyancing Counsel of the Court. In *Re Procter's Settled Estates* (*b*), the instrument to be settled

But where land is to be sold in lots, and one conveyance has been settled by the Conveyancing Counsel of the Court, it may be adopted by the Chief Clerk for all the rest, in which no special circumstances exist to render such a course improper.

(*a*) 19 & 20 Vict. c. 120. (*b*) 26 Law Journ., N. S., Ch., 464.

was a lease—an instrument requiring almost as much care as a settlement. Here it was a conveyance of the fee simple, the form of which admitted of no variety, and was perfectly well known. Besides, the clauses in the Act in reference to leases differed from those relative to conveyances upon a sale of the fee.

1858.
IN RE
EYRE'S ES-
TATES.
—
Argument.

In some of the orders under the Trustee Act, the conveyances were not required to be settled by the Judge.

In the present case, no infants were interested, and even if infants should be born, they were sufficiently represented for this purpose by the tenant for life and remainderman, both of whom would execute the conveyances.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The general rule of the Court is, that, wherever infants are or may be interested in an estate which is ordered to be sold, the conveyance must be settled by the Conveyancing Counsel of the Court. That rule is still more binding in a case, like the present, of a sale under the Settled Estates Act, and where a sale was not contemplated by the person by whom the estate was settled. In such a case, it is more particularly incumbent on the Court to give every protection to the transaction.

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—

I am, therefore, of opinion that the words proposed cannot with propriety be inserted in the order. But it does not necessarily follow, that, in the event of the land being sold in lots as proposed, every one of the many conveyances must be settled by the counsel of the Court. When one has been so settled, it may be adopted by the Chief Clerk for all others in which no special circumstances occur to render such a course improper.

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April 28th &
29th.

*Practice—Issue—Decease
of Plaintiff
before Trial —
Effect of, on
Verdict and
Evidence.*

The circumstance that the Plaintiff in an issue was dead when the issue was tried being unknown at the trial, held, not to afford ground for a new trial.

BIRD v. KERR

THIS suit was instituted for the administration of the estate of an intestate, and a decree was made directing the usual inquiry as to next of kin.

Upon the prosecution of this inquiry in chambers, a claim was brought in on behalf of one *Derwick M'Dougale*, then residing in *America*, who, by his solicitor, claimed to be one of the next of kin of the intestate; and an issue was directed to try the validity of his claim.

This issue was tried, and a verdict found for *Derwick M'Dougale*, the Plaintiff in the issue.

Subsequently, a new trial was directed upon the application of the Defendants at law, the issue directed being substantially the same as upon the former trial. This trial took place on the 28th, 29th, and 30th of July; and upon this occasion a verdict was found for the Defendants.

In the meantime, and about six weeks previously to the second trial, *Derwick M'Dougale*, the Plaintiff in the issue, died in *America*; but his death was not heard of in *England* until the 11th of August following.

Argument.

Mr. *Daniel*, Q. C., with whom were Mr. *Mannisty*, Q. C., and Mr. *Renshaw*, for the personal representatives of *Derwick M'Dougale*, now moved that the same issue might be tried again, or that a new trial might be directed:—*First*, upon the ground, that, *Derwick M'Dougale* being dead, there was, in fact, no Plaintiff in existence at the time of the

trial. The witnesses, therefore, could not be indicted for perjury, and their testimony was deprived of its value. *Secondly*, upon the merits.

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Argument.

The VICE-CHANCELLOR having intimated his opinion that the first ground was insufficient—

Mr. *Rolt*, Q. C., Mr. *Atherton*, Q. C., and Mr. *C. Barber*, for the Plaintiff in equity, resisted this motion upon the merits.

Mr. *Toller*, Q. C., and Mr. *Hetherington*, appeared for Defendants in the same interest with the Plaintiff.

Mr. *Daniel*, Q. C., replied.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

April 29th.
Judgment.

The issue that is now asked is precisely the same as was tried upon the two former occasions.

It appears, that, a month or two before the trial, the Plaintiff in the issue died. But it is perfectly clear, that no one in this country was aware of the circumstance at the time of the trial. The trial proceeded as if the Plaintiff had been living; and it cannot be suggested that any difference occurred in consequence of his death. He had entrusted the whole conduct of the matter to his solicitor, and took no part in it personally.

It was argued, that, as there was no such Plaintiff in existence at the time of the trial, none of the witnesses could now be indicted for perjury; but every witness at the trial

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believed, when he gave his testimony, that the Plaintiff was alive, that the trial was perfectly regular, and that in the evidence which he gave he would be liable to indictment if his testimony were untrue. In that belief, and under that sanction, every witness gave his evidence; and the mere circumstance of its having been since discovered that they were under a mistake in this respect, and that they were not, in fact, liable to indictment, ought not to diminish the weight which their testimony should now have in informing the conscience of the Court.

The issue in this case is not like an issue to try the validity of a will of real estate,—a question upon which this Court has always disclaimed original jurisdiction, and which must be determined, if at all, by a jury. Here the trial was, in the first instance, entirely in the discretion of the Court to direct or not, as it thought fit; and the only object for which it was directed was to inform the conscience of the Court.

I should have thought it a most unfortunate circumstance had I been compelled to come to a contrary conclusion, because, however it may be in this case, in other cases it might be a most grievous burthen to have to try a question like this a second time.

[His Honour then examined the evidence, which satisfied the Court that the verdict on the second trial was correct.]

Minute.

MOTION refused, without costs.

IN THE MATTER OF THE JOINT STOCK COMPANIES
WINDING-UP ACTS, 1848 & 1849,

AND OF

THE LONDON AND EASTERN BANKING
CORPORATION.

THE *London and Eastern Banking Corporation* was a company incorporated under the Act 7 & 8 Vict. c. 113.

On the 11th of March, 1857, the company suspended their banking operations, and from that time ceased to carry on business, except for the purpose of liquidation.

By an order dated the 25th of November, 1857, the company was absolutely dissolved from that day, and was ordered to be wound up under "The Joint Stock Companies Winding-up Acts, 1848 and 1849."

On the 21st of December following an official manager was appointed for winding up the company under those Acts.

On the 13th of January, 1858, a creditors' representative was appointed in the matter of the said winding-up, in pursuance of advertisements for that purpose previously issued by direction of the Court, in conformity with the Act 20 & 21 Vict. c. 78.

On the same day a writ was issued by Sir *Charles Forbes* and others against the company upon a bill of exchange for 1000*l.*, dated 15th April, 1857.

creditor to attend and supervise proceedings in chambers under the Winding-up Acts in any way he may consider desirable for securing payment of the debts of the company.

Proper course to be taken by creditors' representative for this purpose.

Interpretation of The Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78).

(a) *Infra*, p. 291, q. v.

T 2

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V. C. Wood,
March 27th
& 29th.

LORDS JUSTICES,
March 30th.

LORD CHANCELLOR,
May 24th &
29th (a).

Joint Stock Companies Winding-up Acts—7 & 8 Vict. c. 111,—11 & 12 Vict. c. 45—20 & 21 Vict. c. 78—Bankruptcy—Injunction—Creditors' Representative.

Injunction to restrain proceedings at law for the purpose of making a company bankrupt refused, notwithstanding an order had been made for winding up the company, and an official manager and creditors' representative had been appointed before the commencement of such proceedings,—the creditors' representative appearing and expressing his consent to their prosecution.

Right of a

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A copy of the writ was served on the manager. An order was made; and on the 20th of March, the manager was served with a demand of payment of the judgment debt and costs.

Statement.

It was admitted that the object of these proceedings was to make the company bankrupts.

It appeared that the official manager was proceeding as speedily as possible with the realisation of the estate.

Argument.

Mr. *Rolt*, Q. C., Mr. *Hetherington*, and Mr. *Roxburgh*, for the official manager, now moved that the Plaintiffs at law might be restrained from taking any proceedings in their action on their judgment, or on their demand, for the purpose of making the company bankrupt.

They distinguished the case from that of *Aitchison v. Lee, Re The Royal British Bank* (a), on the ground that here the official manager was appointed, and had the entire estate vested in him, before proceedings at law were commenced for the purpose of making the company bankrupt.

Mr. *Daniel*, Q. C., and Mr. *Rodwell*, for the creditors' representative, stated, in answer to a question put to him by the Court, that he had no intention of entering into any agreement under the 3rd section of "The Joint Stock Companies Winding-up Amendment Act, 1857" (b), being desirous that the proceedings in bankruptcy should take their course.

Mr. *Amphlett*, Q. C., and Mr. *E. M'Naghten*, for Sir *Charles Forbes & Co.*, the Plaintiffs at law.

(a) 3 Drew. 637; S. C., 26 Law J., N. S., Bank., 6.

(b) 20 & 21 Vict. c. 78.

Mr. *Hetherington* replied.

The arguments on both sides, as also the clauses of the Acts of Parliament on which they turned, will appear from the judgment.

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Argument.

The following cases were cited : *Attwood v. Banks* (a), *Pennell v. Roy* (b), and *Ex parte Fletcher* (c).

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I cannot but feel considerable difficulty in construing an Act which has not clearly enunciated the several propositions which must evidently have been before the Legislature, and to which the attention of the Legislature must have been called, at the time when they were about to legislate. I cannot say that I have a precise or definite idea of the exact extent to which the Legislature meant the enactment to operate. But, on looking to the whole of the present case, I have no doubt, that, on this application for an injunction to restrain an alleged legal right, if there be any question at all whether such a right exists or can be exercised, I ought not to interfere. I feel that I might occasion more inconvenience by such interference than could ensue from my refusing to interfere ; and more especially in this case ought I to abstain from such interference, because, from the present construction of our courts, the Superior Court which controls my decision has also the power, which I have not, of expressing an opinion with reference to the law in bankruptcy, and has, therefore, more complete jurisdiction over the whole matter. By attempting to shut out, even for a time, the jurisdiction of the Commissioners in Bankruptcy, I should, as it seems to

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(a) 2 Beav. 192. (b) 3 D. M. G. 126. (c) 2 Deac. & Ch. 90.

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me, be doing injustice to those who wish to ascertain their rights before that tribunal.

The present state of our legislation with reference to winding-up joint stock companies is anything but satisfactory.

The Act of the 7th & 8th of the Queen (*a*), which enabled persons desirous of bringing the Bankrupt Laws into operation against joint stock companies to take that course of proceeding, was an Act entirely for the benefit of the creditors of the companies. It was found that it could not have the operation of settling the various equities existing between the *several shareholders inter se*, and great injustice was continually perpetrated with reference to individual shareholders, who were made victims of proceedings in bankruptcy or elsewhere, instituted by the creditors, without having any power of compelling contribution from the several other shareholders in the company. The machinery of this Court was not found adequate to meet injustice of that description, and therefore it was that the Winding-up Act of 1848 was passed—the Act 11 & 12 Vict. c. 45.

That Act unquestionably was one intended wholly for the benefit of shareholders, and for the arrangement of their affairs *inter se*. The payment of creditors was merely incidental to the administration of the equities amongst the shareholders. Creditors had no power or authority whatsoever given them by its provisions; they could not initiate proceedings except in an imperfect manner. By the 38th, and some other sections, they were entitled to submit proposals at their own expense, and, at their own expense, to appoint a solicitor to watch the proceedings in the matter of the dissolved company; and thus a species of control, but of a very imperfect and inadequate character, was given to them. The 58th section, it is true, expressly enacts,—

(*a*) 7 & 8 Vict. c. 111.

what, as it appears to me, is the leading feature of the Act—the clue, as it were, to its construction—that nothing in the Act contained shall diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, except as is thereby expressly provided. But the Act was an Act for the benefit of the shareholders inter se for the arrangement of their common affairs, and not in any way for the benefit of creditors. On the contrary, by the 73rd section limitations are put upon the rights of creditors, that section providing that no action or suit shall be instituted by any creditor (except so far as the Master shall permit) until after proof, or making such proof as he may be able, of his debt before the Master. It being for the advantage of all the contributories, and justice requiring, as regards the company, that all the liabilities of the company should be ascertained, the legislature says, by that section, that the most expedient way of ascertaining the full extent of the liabilities will be, to require every creditor to come in and state his claim before he shall be allowed to enforce it, that, the amount of assets and debts being ascertained, the Court may be in a position to do justice to the contributories. To that extent, therefore, a limitation was imposed upon the rights of a creditor, but the limitation went no further. His hand was arrested for a time from instituting or proceeding with any action against the company; but, from the moment he came in and proved or tendered such proof as he was able of his demand, thereby informing the contributories of the extent of the liability hanging over them, and for which they ought to make provision, from that moment his duty was discharged, and he was immediately allowed to bring any action he might think fit.

In that state of the law the question came to be considered between the *Royal British Bank* and their creditors. The obvious defect of the two modes of operation was this,

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the creditors had for their assistance, and for administering their equities inter se, the ordinary jurisdiction of the Commissioners in Bankruptcy—a jurisdiction which did not assist the contributories. The contributories, on the other hand, in administering their equities inter se, had an Act for that purpose, which provided incidentally, but only incidentally, for the payment of creditors. The defect—and it was one which I should have expected the Legislature would have supplied ere this, but the last enactment does not appear to me to have supplied it—was the want of some provision for bringing those two distinct operations into one uniform course of jurisdiction, which should at once adjust all the claims between contributories inter se, and satisfy all debts due from the company to the various creditors of the concern.

The inconvenience in the *Royal British Bank case* (a), was this:—Before an official manager was appointed, there occurred an adjudication in bankruptcy, which adjudication, having reference back to the period when the notice of the trader's debtor's summons had been served, overreached the effect of the appointment of the official manager, and also the order for winding-up. It certainly overreached the appointment of the official manager, and the consequence was an immediate conflict between the two jurisdictions; and the Court there came to the conclusion, after a very clear and lucid exposition of the Act by Lord Justice *Turner*, that, the Act for winding-up being in effect for the benefit only of the debtor, and not for the benefit of the creditor, the proceedings in bankruptcy should take precedence, whatever might be the consequence; and, inasmuch as in that case the estate was not vested in the official manager, the right of the assignees in bankruptcy prevailed against him; and the assets were transferred to the assignees in bankruptcy. There, as was observed, no

(a) 3 Drew. 637; S. C., 26 Law J., N. S., Bank., 6.

very great mischief ensued beyond that which must always attach to litigation in two distinct Courts operating upon the same fund. The fund was first distributable among the creditors in the court of bankruptcy, and what remained was left to be administered amongst the contributories *inter se*.

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The case before me goes a step further.

I will first consider how the case would stand if it had occurred before the Act of last session, the 20th & 21st Vict. c. 78. The fund being in the hands of the official manager, I think it open to very grave doubt (although I can foresee an argument that might be used on the other hand,) whether any of these assets could ever be divested from the official manager in the event of a bankruptcy taking place. And, if that be so, then you have not the advantage which existed in the *British Bank case* of administration amongst the creditors in the court of bankruptcy—in “their own forum,” as it was called by Lord Justice *Turner*, a forum to which they have a right to look for a decision. You have not, as there you had, an administration of the whole of the property amongst the creditors, the contributories being left to be dealt with after that operation is performed. But you have this singular anomaly: If the bankruptcy is to take place, there will be no fund on which you can operate, inasmuch as, every portion of the property being vested in the official manager, the distribution must be through the medium of the winding-up order, and that alone; and the only benefit that can accrue under the bankruptcy is such as was suggested in argument, namely, the possibility, in cases of fraudulent preference and the like, that creditors would have the right to insist on exercising the powers given them by the jurisdiction in bankruptcy of summoning the directors to make out a balance sheet; and even that is subject to this peculiar anomaly, that, when you summon them to

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produce all their books and vouchers, neither the one nor the other can they do without the permission of this Court, because their books and papers are in the possession of the official manager.

Therefore, it was argued, and I must say with great force, that it does seem singular that the Legislature should have wished, after the appointment of the official manager and after the property had become vested in the official manager, that this right of proceeding in bankruptcy should still be exercised, where apparently there is so little to be operated upon so as to produce any benefit to the creditors, and where, in effect, the machinery even for the purpose that was suggested—namely, that of searching the consciences of directors in what was represented as a more effectual manner,—would become completely inefficient, unless this Court would assist, as it would be bound to assist if necessary for the purpose of justice, by allowing the production of the papers and documents in the hands of the official manager upon application for that purpose.

However, it is not necessary for me to say more than this, that, looking to the decision in the *British Bank case*, and to the grounds of that decision, viz. that, by the Winding-up Act of 1848, the rights of creditors were not to be in anywise altered or affected, except as by that Act was expressly provided; and there being no express provision that they should not avail themselves of the Act 7 & 8 Vict. c. 111, enabling them to obtain a fiat in bankruptcy against the company, it appears to me, that, if this case had occurred before the Act 20 & 21 Vict. c. 78, it would have been impossible for the Court, notwithstanding the circumstance of the property having become vested in the official manager before proceedings in bankruptcy are commenced, to come to any other conclusion than that those

proceedings must be allowed to be had, whatever may be the result.

Thus far I have been considering the case as if it had occurred before the passing of the Act of last session. I have now to consider what has been effected by the provisions of that Act.

The Act of last session remedied a great defect in our legislation; and one would have expected that the Legislature, having gone so far, would have proceeded to take that further step, which was requisite for making it perfect, and doing complete justice between all parties, either by giving full and complete jurisdiction to one of the two tribunals—the Commissioners in Bankruptcy, or the Court of Chancery—to the exclusion of the other; or else by leaving to each tribunal concurrent jurisdiction, but coupled with a clear and definite enactment, that, when once either of them shall have assumed jurisdiction in any matter, from that moment it shall not be competent to the other to interfere. But something intermediate has been done, and, beyond all question, no clear provision to that effect is to be found in the Act.

On the contrary, if the Act be read in the only way in which it can be construed, it would appear that the Legislature has purposely left the opposite course still open.

In the 1st section the Legislature says: "*In all cases in which an order heretofore has been or hereafter shall be made for the dissolution and winding-up, or for the winding-up, of any company, it shall be lawful for the Judge or Master charged with the winding-up of any company, at the instance of any creditor of such company or otherwise, in all cases in which it shall appear expedient and for the benefit of the parties interested, in and by the*

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advertisement for proof of debts required by the 72nd section of 'The Joint Stock Companies Winding-up Act 1848,' or by subsequent advertisements, or by notice transmitted to each of the creditors by post, as directed by the said two before-mentioned Acts, from time to time to call upon the creditors of the company to meet before such Judge or Master, at such time and place as shall be fixed by him, for the purpose of appointing one or more person or persons *other than the official manager*, to represent all the creditors of the said company."

It was urged in the course of the argument in support of the motion, that the Legislature must have intended this section to apply to cases where the property had not been vested in the official manager.

But the first thing which strikes one in that section is, that it applies to all cases—to cases where orders shall have been theretofore made, as well as to cases where orders shall be thereafter made, which must necessarily include a vast number where official managers have been appointed and are in existence. Besides, it clearly contemplates the possibility of there being an official manager, by the express provision that the person to be appointed as creditors' representative shall be some person "other than the official manager." The Legislature proposes in this clause to provide for all cases, and it says, that where there shall be an official manager he shall not be the representative of the creditors.

The section then proceeds thus :—"Provided always, that, in case such company heretofore has been or hereafter shall be adjudged bankrupt, the assignees of the estate and effects of such bankrupt company shall be deemed and taken to be, and they are hereby constituted, (without such advertisement or meeting as hereinbefore mentioned), repre-

sentatives of the creditors for the purposes of this Act." That is a case of bankruptcy with assignees appointed, before the Judge issues the advertisement calling the creditors together. Then comes this clause(a)—"Provided also, that if any such representative or representatives of the creditors shall have been chosen or appointed in the matter of the winding-up of any company before the appointment of assignees under the adjudication of bankruptcy against the same company, then, upon such appointment of assignees, the rights, powers, and authorities of such representative or representatives shall cease and determine, and the same rights, powers, and authorities shall thereupon become vested in and may lawfully be had and exercised by such assignees as aforesaid; and such representative or representatives shall be entitled to his or their reasonable costs in the matter of the winding-up of such company."

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Now this clause, substituting as it does assignees under an adjudication in bankruptcy for the representatives actually appointed, must contemplate a state of things in which the adjudication in bankruptcy is subsequent to the order for winding-up; for, by the 6th section of the Winding-up Act of 1848, it is provided, that, after there has been a bankruptcy, no petition can be presented for winding-up any company, except upon the application of the assignees in bankruptcy. So that the bankruptcy here pointed out must be a bankruptcy which has taken place after the winding-up order has been pronounced, and after the appointment of the creditors' representative.

In answer to this argument it was suggested, that the clause in question may apply to two cases where no official manager has been effectually appointed;—that it may apply to the case of a mere adjudication in bankruptcy, which, by

(a) Sect. 1 continued.

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relation to the act of bankruptcy, antecedent to the winding-up order, would, in effect, supersede the winding-up order, if any, so as to defeat the title of an official manager, if he existed; and it might apply to a case where an official manager has not been appointed, although there has been an order for winding-up, or an appointment of a creditors' representative. It might apply to two such cases; but I am not on that account at liberty to say that it is confined to those two cases; and when I find the Legislature in all the previous parts of the section contemplating cases in which an official manager has been appointed, it is impossible for me to hold that the clause in question does not apply to cases of that description.

Then we have the 3rd section, which is this—"It shall be lawful for such representatives or representative as hereinbefore mentioned, to join and concur or take part in all the proceedings in and about the winding-up of the said company, or such of the same proceedings as the Judge or Master shall deem expedient for the interest of the creditors, and also, subject as hereinafter is mentioned, and so far as the creditors of the said company are concerned, to make or enter into, take part in, consent to, or approve of any compromise, composition, or arbitration, or other arrangement, whether for the discharge and satisfaction of the liability of all and every the shareholders and members, or any or either of them, to the debts and liabilities of such company or otherwise, as such representatives or representative for the time being shall think fit; and the certificate of the Judge or Master shall be deemed and taken as full and sufficient evidence and proof of every such compromise, composition, arbitration, or other arrangement, and of any discharge or *release* which may have been thereby effected; and it shall also be lawful for such representatives or representative as hereinbefore mentioned (subject as aforesaid) to take part in, consent to, or approve of any compromise,

composition, arbitration, or other arrangement which the official manager may propose to make or enter into with the debtors or creditors of the said company or otherwise in respect of its estate or affairs; and all the creditors of the said company, whether their debts shall have been then proved or not, shall, subject to the provisions hereinafter contained, be fully and effectually bound by the acts of such representatives or representative as to all such matters as are authorised by this Act."

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I will comment upon that presently, for it may remove some of the inconveniences which otherwise would seem to be extreme on the construction of this Act.

The 7th section proceeds thus:—"When any such company heretofore has been or hereafter shall be adjudicated bankrupt, then, if or so soon as creditors' assignees shall have been appointed, or when any such company shall not have been or be adjudicated bankrupt, then, after the Judge or Master shall, by advertisement, have called on the creditors to appoint a representative or representatives as hereinbefore mentioned, no such action as is mentioned in the 73rd section of the said 'Joint Stock Companies Winding-up Act, 1848' shall be commenced or proceeded with otherwise than for the purpose of making the company bankrupt."

Now, the 14th section provides, that this Act shall be taken and construed as part of the "Joint Stock Companies Winding-up Acts 1848 & 1849;" and taking the two Acts together, I find the 58th section of the Act of 1848, enacting that the rights of creditors shall not be diminished, prejudiced, or in anywise altered or affected by anything in that Act contained, except as thereby expressly provided. That being the effect of the Act of 1848, and the Act of last session being to be taken and construed as a part of that Act,

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I am to look in the Act of last session for an express proviso depriving a creditor of his right to proceed in bankruptcy; and so far from finding any such express proviso, all I find is the proviso I have read from the 7th section—that, after advertisement calling upon the creditors to appoint a representative, no such action as there mentioned shall be commenced or proceeded with, otherwise than for the purpose of making the company bankrupt.

Indeed, the argument that the creditor is deprived of his right to proceed in bankruptcy was rested not upon express enactment, but upon necessary implication. Now, as regards necessary implication, no doubt it is a sound principle of construction, that, where an Act admits of but one construction, there is a necessary implication that that construction was intended, and such necessary implication is equivalent to express enactment. And if, in this case, I found the only possible construction of the Act was this,—that the whole administration should be in this Court, and in this Court only, that this Court should exercise all the powers of the Court of Bankruptcy, and should have full and complete jurisdiction in every possible way,—in that case it would be possible to contend, that, upon the whole of the Act, there is a necessary implication, equivalent to express enactment, negating the rights of a creditor to proceed in bankruptcy where an official manager has once been appointed. But, when I find that not only is there no express proviso negating his right to proceed in bankruptcy, but that there is an express positive enactment that *he shall be allowed* so to proceed, I am not at liberty to evade the force of that express enactment, merely because a possible state of circumstances can be suggested, in which it would be less strange than it is in those now before me, to suppose that the Legislature meant the Act to apply.

Had the Legislature intended to enforce the application

of the Act to cases in which no official manager has yet been appointed, and in which as yet only a creditors' representative has been appointed, it was competent to them to do so. But, when I find not only that they have not taken that course, but that they clearly contemplated that, at the time of the appointment of the creditors' representative, there would be, in a large number of cases, official managers already appointed, that they expressly enacted that no one should be appointed creditors' representative who was already an official manager; and lastly, that, after the advertisement calling on the creditors to appoint their representative, proceedings are allowed to be commenced for the purpose of making the company bankrupt—is there anything which can authorise me to say that there is in this Act a necessary implication equivalent to an express prohibition against such proceeding? It appears to me, that there is not. And, if I was right in the view which I took of the case as it would have stood before the passing of the recent Act—viz. that the existence of the property in the official manager would not have justified me in adopting a conclusion different from that which was arrived at in the *British Bank case*, it appears to me plain that there is nothing in the recent Act to authorise any other conclusion.

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With regard to the inconvenience that may ensue, I foresee, as I have said already, that it will be considerable; that but little good can result from proceeding in bankruptcy when there is no estate to administer, or from summoning the directors to be examined when they can not only be as well examined here, but will be unable to produce any books or papers, or any balance sheet, without an application to this Court for that purpose, and when, according to the express provisions of the 7th section, no execution or scire facias can be issued or proceeded with without the leave of this Court. But inconveniences of that kind are met in a great degree by the 3rd section, which, be-

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yond all doubt, would enable the representative of the creditors to come to an agreement with the company for a compromise of all claims, and to stop all proceedings in bankruptcy, and all other proceedings whatsoever. He might compromise all claims and release the company (the word "release" expressly occurs in the section in question) from all their liabilities, and, if they are released from all liabilities, this Court would not allow any proceeding in bankruptcy to go on; there would be a clear and substantial equity to the contrary by the agreement of a person representing the whole body of creditors. It was this circumstance which made me desirous to know what course was taken by the creditors' representative in this case; and I find that he has no intention of entering into any such agreement, but prefers that the proceedings in bankruptcy should take their course.

Another argument, which was very strongly urged in support of the motion, was this:—The Act provides, that, when a creditors' representative is appointed, the creditors shall be parties to the winding-up. Then, it was said, the creditors being parties to the winding-up, and their representative binding the entire body which he represents, one of the body so represented takes steps of his own, calling upon the company either to pay him his debt or to become bankrupt,—the Court, meanwhile, has got the fund, and has it in its power to say whether the company shall become bankrupt or not, by ordering payment of the debt,—and that, it was said, is not a situation in which it should have its jurisdiction placed; the creditor insisting that unless the Court consents to exercise its jurisdiction to the prejudice of the general body of creditors, by paying a particular creditor, bankruptcy is to ensue.

That, again, would be a very strong argument, if the creditors' representative had not taken the course he has. He represents the whole body of creditors, and, therefore,

I have the whole body of creditors saying that they make no objection to the proceeding. The reasoning of Vice-Chancellor *Kindersley* upon the course of proceeding in administering assets in this Court, in the case of the *Royal British Bank*, appears to me, if I may be allowed to say so, to be a very correct and sound way of viewing the question. He says, this Court considers, when a decree has been made for the administration of the assets, that it is so made for the benefit of all the creditors; and this Court considers it for the benefit of all to be paid rateably, of course according to their priorities, and will not allow a single creditor to obtain an advantage over the rest. If, therefore, in this case, the representative of the body of creditors were to object to the course taken by the particular creditor who has commenced these proceedings at law, as being an indirect mode of obtaining an advantage over the general body, by driving the company to bankruptcy in the event of his debt being unpaid,—if he, as representing the general body of creditors, were to say, “This is not a course which we think should be pursued; we think that the proper mode of dividing the fund rateably amongst us is by proceeding under the Winding-up Act, to which we are all parties,”—it would be something very analogous to the case of administration of assets upon the death of a testator amongst his several classes of creditors; and I am much inclined to think that the Court would not allow a single creditor to take a course of proceeding, having merely for its object to force full payment of his own debt, all the other creditors being opposed to that course of proceeding. But here the course which all the other creditors wish to take, and say they think the best, is to put aside all equities as amongst themselves. That being so, I cannot find in the course of legislation upon this subject any equity on the part of contributories to support the contention, that the course of proceeding now devised shall not take place.

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Judgment.

I am unwilling to dispose of the case without saying a word on what is supposed to be the course of proceeding in chambers under the Winding-up Acts. I think it would be most unfortunate, if it were supposed that a creditor has not a full right to attend and supervise the proceedings in any way he may consider desirable for securing payment of the debts of the company. In this case the order that has been made, as I understand it, is, that the creditors' representative should have notice of all proceedings, and should have liberty to attend, upon application being made by him for that purpose. That he must, at some time or other, make application under the 3rd section, I apprehend, is clear; because he is only to attend such proceedings as the Judge may deem expedient for the interest of the creditors. I apprehend it would have been open to him, and it would be his duty, to apply to the Judge in limine, and state the class of proceedings which he wished to attend, and not to make his application at every summons to be allowed to be present at that particular summons, which would be a very disagreeable course for all parties. I should have thought, that the simple course would have been for him, when the order was taken in, to say at once, "Here is a class of proceedings which I wish to attend, and another class which I do not wish to attend;" and that, as it appears to me, would have been, under the 3rd section of the Act, as ample a protection to the creditors as proceedings in bankruptcy.

I am bound to say, that, with the exception of the suggestion as to the possibility of fraudulent preference, I am at a loss to discover any possible advantage that can be derived by any person from proceeding in bankruptcy. At the same time, I do not feel in a position to say that they should not have an opportunity of asserting their right before the Commissioner in Bankruptcy, in the position in which the whole mass of the creditors have placed the matter, all of them considering that it is for their benefit that bankruptcy should take place.

One advantage of not stopping the proceedings is, that whenever the question as to the fiat in bankruptcy is tried and disposed of, if the decision is adverse to the present applicant who seeks to stay the proceedings, he will have full opportunity of bringing before one Court two questions, namely, the equitable question, whether there should be an injunction, in the first instance, to restrain these proceedings; and the legal question, whether the fiat can be sustained,—that one Court having jurisdiction, which I have not, to determine both questions.

I must therefore refuse this order; and I am bound to refuse it with costs. I think, however, that the costs should come out of the estate.

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IN RE LONDON
& EASTERN
BANKING
CORPORATION.
—
Judgment.

On appeal to the LORDS JUSTICES in the matter and in the bankruptcy, the Plaintiffs in the action undertaking not to proceed beyond adjudication, the motion was ordered to stand over.

LORDS JUSTICES.
—
March 30th.

Upon the matter coming before the LORD CHANCELLOR, his Lordship, after full argument, and having reserved judgment, refused to annul the adjudication; but restrained the assignees in bankruptcy, when appointed, from using the proceedings in the bankruptcy in any other manner than in their character of creditors' representatives, for the purpose of co-operating in the winding-up.

LORD CHANCELLOR.
—
May 24th.

Being now moved on behalf of the official manager to preface the foregoing order by the words, "That no further proceedings be taken in the bankruptcy beyond the appointment of assignees"—The LORD CHANCELLOR refused, saying, that his object was not to interfere with any benefit the creditors could obtain under the bankruptcy, beyond what they could get under the winding-up order.

May 29th.

1858.

April 17th.

ATTORNEY-GENERAL v. CHAMBERLAINE.

Sea—Fore-
shore—En-
croachment—
Purpresture—
Rights
of Crown—
Form of Issues
where disputed
—Onus of
Proof.

Where the Crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if the Defendant disputes the Crown's title to the soil between present high and low watermark, the Court will direct issues to try that right before inquiring how far in former times the ancient high watermark extended inland: And this course will be adhered to, notwithstanding the hardship it may impose upon the Defendant, who, by admitting the soil on which he has

THE object of this suit was to establish the right of the Crown to that part of the foreshore of a certain creek or pool, forming an inlet of the river *Mersey*, and called *Tranmere Pool*, which was situate in front of or adjacent to certain lands belonging to the Defendant *Chamberlaine*, called the *Tranmere Ferry* estate.

The information averred, that part of *Tranmere Pool* had been reclaimed from the estuary by means of a road and embankments, running in a southerly direction across the head of the pool; and it charged that the whole of the pool and the bed soil, shores, banks, and strands thereof, as well above as below the road, and whatsoever parts thereof respectively had been reclaimed from the estuary, together with all profits arising therefrom, now belonged to the Queen in right of her crown.

The information then averred, that the Defendant *Chamberlaine*, and his predecessors in title, had, from time to time, since the making of the road across the pool, without any grant, &c., unlawfully inclosed, by means of walls and otherwise, not only that part of the shore or strand of the pool adjoining his estate which lay above the road, but also a considerable portion of that part thereof which lay below and to the eastward of the road between it and the mouth of the pool, had embanked and filled in the land so inclosed, and had erected divers buildings thereon; and it averred,

done acts of ownership to be part of the foreshore, will in effect have proved the case of the Crown in the event of his failing to satisfy a jury that a grant must be presumed.

But if in a case like the above the Defendant admits the Crown's title to the soil between present high and low watermarks, then upon an inquiry what is the boundary of the foreshore, the onus would be thrown upon the Crown of showing that the high watermark in former times extended further inland than at present—*Semble*.

that such buildings were to the seaward of what was, previously to the making of the embankments, the high watermark of the estuary there at ordinary tides, and were encroachments upon the property of the Queen.

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The Defendant *Chamberlaine* and other Defendants in the same interest with him denied the right of the Crown to any part of the shore or strand of the pool, and claimed to be entitled to the whole thereof as part and parcel of the manor of *Tranmere*, under a grant from the lord. They also insisted, that part of the land alleged to have been reclaimed was never subject to the flow and reflow of the tides.

Upon the cause now coming on to be heard upon motion for a decree, a question arose as to the form of the decree, and, in particular, as to the issues to be tried.

In the minutes proposed on behalf of the Crown, the issues were :—

First, whether, on the 8th of August, 1856 (when the information was exhibited,) the Queen was seised in right of her crown of that part of the shore of *Tranmere Pool*, lying between ordinary high watermark and ordinary low watermark, and situate in front of or adjacent to the lands in the information called *The Tranmere Ferry Estate*.

Secondly, whether, on the same day, the Queen was seised in right of her crown of any portion of that part of the shore.

Thirdly, whether, if the Queen in right of her crown was seised of that part of the shore or of any portion thereof, the right of action or suit of the Queen to the same or such portion thereof was, on the 8th of August, 1856, barred or

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taken away by adverse possession by the Defendants or any of them, or by any persons or person through or under whom they claim.

In the same minutes it was also proposed, that, in case a verdict upon either the first or second issue, and also upon the third issue, should be found in favour of the Attorney-General, it should be referred to the Judge to appoint a fit and proper person, being an engineer or a surveyor, to inquire and report to the Court what portion, if any, of the lands, buildings, or hereditaments in the information stated to have been inclosed, embanked, erected, or made from or upon the shore of *Tranmere Pool*, were inclosed, embanked, erected, or made from or upon the shore of *Tranmere Pool* below high watermark at ordinary tides, within sixty years before the 8th of August, 1856, when the information was exhibited, and to make a plan of the said several premises.

The Defendants objected to the words "lying between ordinary high watermark and ordinary low watermark" in the issues proposed on behalf of the Crown.

Argument.

The *Solicitor-General*, Mr. James, Q.C., and Mr. Hanson, on behalf of the Crown, contended that the decree proposed on behalf of the Crown furnished the only proper and convenient mode by which, in an information of this nature, the facts in question could be ascertained, and adequate relief afforded. The Defendants having denied the right of the Crown not only to the land between the ancient high and low watermarks, but also to that part of the shore which lay between the present high and low watermarks, the question of the Crown's right to the latter should be first determined. This it would be by the issues proposed for the purpose on behalf of the Crown. If the verdict on those issues should be against the Crown, there would be an end of the

case; if in favour of the Crown, then would be the proper time to go on to direct further inquiry how far the Defendant's buildings and works were purprestures or encroachments on lands formerly lying between the ancient high and low watermarks.

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 —
Argument.

That the latter subject would be properly matter for inquiry and not for a jury, was clear not only upon precedent and authority, *Attorney-General of the Prince of Wales v. St. Aubyn* (a), and *Attorney-General v. Philpott* (b), but

(a) Wightw. 167.

(a) 7 Car. 1, Nov. 26, cited in *Mr. Hargrave's Tracts*, p. 13. By the decree (a copy of which, certified under the Act 1 & 2 Vict. c. 94, was now produced in court) it appeared that the material facts and proceedings in the cause were as follows :—

The information was exhibited, 5 Car. 1, against the Defendant *Philpott* and others in respect of certain houses, tenements, wharf, and dock made and built by the Defendants upon the shores and soil of the river *Thames* on the north side of the river, from *Hermitage Wharf* in the county of *Middlesex*, eastward to *Dickshore*, at *Limehouse*, in the information alleged to belong of right to his Majesty: And it prayed that his Majesty might be satisfied of the mesne rates and profits of the said houses and premises, and that the purprestures made and continued upon the bank, walls and soil of the said river might be abated.

The Defendants by their answers denied the encroachments and purprestures mentioned in the information.

The cause was heard on the 5th of May, 7 Car. 1; when it was ordered that a commission should be awarded to view the wharfs and buildings on the north side of the river, from *Hermitage Wharf* to *Dickshore*, eastward, and to survey, set down, and describe where the ancient wall went, which was anciently called by the name of the *Thames Wall*, or *Wapping Wall*, and what houses, building, wharf, and dock had been, within the space of fifty years last past, built, made, or erected on the south side of the said wall or on the south side of the place where the said wall anciently went.

The commissioners certified where the wall went, and that there were many encroachments and purprestures on the south side of the said wall; but, the particulars and extent of such encroachments and purprestures not appearing by their certificate, the commission was ordered to be renewed.

This being done, and the commission having been executed, the cause was fully heard; and a decree was made on the 26th

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also upon principle. "A court of law has no power to ascertain the extent of the shores or land assumed; it can only direct possession to be given. It has no power to grant a commission to set out boundaries. It has no power to establish the old boundaries; to direct intermingled lands to be separated, or an equivalent set out, and old inclosures and bounds restored. The judgment might be too severe, and take from the Crown its known prerogative of lenity in arrenting erections and purprestures, and other indulgences, where great expense has been incurred. It was the privilege of the Crown to set a rent upon these purprestures,

of November in the same year, whereby it was declared, adjudged, and decreed, that the soil and ground between the ancient wall, commonly called *Thames Wall* or *Wapping Wall*, of the north, and the river of *Thames* upon the south was parcel of the port of *London*, and belonged as such to the king. And as touching the several houses, wharf, yard, dock, and other building in the several tenures and occupations of the Defendants or their undertenants, it was likewise decreed that so many or so much of them as should appear to be, or be built or erected between the said wall of the north, and the said river of the south, were encroachments and purprestures upon the said river and port, and were to be removed and abated, or otherwise arrented at his Majesty's pleasure. But because it did not specially and precisely appear to this Court how much of the said houses, &c., were built or erected between the said ancient wall of the north and the said river of *Thames* upon the south, it was or-

dered that a commission should be awarded to survey and view the said houses &c., and as many or as much of them, with the certain and special content and quantities or extent thereof as should appear upon view thereof to be, or be, so erected or built as aforesaid in and upon the soil or ground between the said ancient wall called *Thames Wall* or *Wapping Wall* upon the north, and the said river of *Thames* upon the south,—the which same ancient wall upon the north of the said river was declared and adjudged by the Court to be and have been of long and ancient time the high watermark of the said river in those parts; and the same to seize and take into his Majesty's hand as parcel of the said port of *London*, and inheritance of the crown, to be abated or arrented at his Majesty's good pleasure for the increase of the revenues of the Crown. (Records of the Court of Exchequer in the Public Record Office. Entries of Decrees, 7 Car. 1, Vol. iv. p. 36.)

or to make grants of them upon easy terms, but this could not be done in any proceedings at law:" Per *Graham*, B., in *The Attorney-General of the Prince of Wales v. St. Aubyn* (a). If such an inquiry were left to a jury, it would be necessary to have a separate issue for every house and every yard of land alleged to have been matter of encroachment.

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Mr. *Rolt*, Q.C., Mr. *G. L. Russell*, and Mr. *Joliffe*, for the Defendants, contended, that either the line of the foreshore should be ascertained before the issues were tried, or else the issues should be general, and not confined to that part of the shore which now lay between ordinary high watermark and ordinary low watermark. The case of the Crown was, that the Defendants had encroached. The Defendants denied that they had done so. The affirmative, therefore, lay with the Crown; and in order to prove encroachment, the Crown must first state how much it claimed, must point out how far in former times, and before the alleged encroachments, the old high watermark extended inland.

The VICE-CHANCELLOR.—That is precisely what these authorities are cited to show has never been done.

Mr. *Russell*.—If the authorities go to that extent, the Court will make a precedent. Such a course cannot prejudice the Crown, while, on the other hand, a contrary course may seriously prejudice the Defendants. The case of the Defendants must be made out by evidence, either of an actual grant or of acts of ownership, from which a grant must be presumed; but until the Crown has pointed out how much it claims as foreshore, how can the Defendants know within what limits it will be material for them to prove acts of ownership? Very possibly, the Defendants will not be able to prove acts of ownership between present

(a) Wightw. 230.

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high and low watermarks, while they may well be able to prove many such acts between the old high and low watermarks; but to make such evidence material, it must first be ascertained what the Crown will be content to treat as ancient high watermark, otherwise the whole of the Defendants' evidence may be rejected at the trial as relating to ground which the Crown disclaims. Besides, the Defendants may be still further prejudiced, if the onus of showing what is foreshore is to lie with them and not with the Crown, for, by admitting the soil on which they prove acts of ownership to have been part of the foreshore, in the event of their evidence proving insufficient to warrant the presumption of a grant, they will have proved the case of the Crown, and admitted possibly against themselves, that the ancient foreshore extended further inland than the Crown would ever have thought of extending its claim. It stands to reason, the Crown seeking in effect to eject the Defendants from land which the Defendants have occupied for many years without molestation, the onus is with the Crown, at least to define the boundaries within which it claims seisin.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If the question at issue between the Crown and the Defendants were simply what is the boundary of the foreshore, then, I apprehend, some inquiry would be directed to determine that question; and, in that case, it might well be that the onus would be thrown upon the Crown, of showing that the high watermark, in former times, extended further inland than at present.

But here, before arriving at that inquiry, the Crown is

intercepted by the case made on the part of the the Defendants, that case being, that it is immaterial to them what may have been the limits of the foreshore in former times, the whole of the foreshore, ancient and modern, being in them and not in the Crown. The Crown, being intercepted by that case, must try which right is the stronger.

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I quite see the difficulty, and the possible hardship, this may impose upon the Defendants (whether there will be actual hardship I cannot tell until the case is tried), for their position is this: They assert their right to the whole of the foreshore; and if they are to try that right with the Crown, one of the modes by which they may make out their right, if they cannot produce an actual grant, will be to give evidence of such acts of ownership as would be sufficient to lead a jury to presume that there was once a grant of the foreshore. They may have to show that certain portions of the property upon which they have erected valuable buildings, or the like, were formerly part of the foreshore. And if they take that course, and if, after all, the jury, unfortunately for them, should find a verdict for the Crown, when they come back to determine what is foreshore and what is not, they will have proved that the ground on which those acts were done is foreshore, and will have placed themselves in a difficulty.

That, however, is a difficulty arising incidentally from the course the Defendants have taken in intercepting the right of the Crown. If they had begun by admitting that the Crown is entitled to whatever is now actually foreshore in the proper sense of the term, as lying between present high and low watermarks, then, of course, an inquiry would have been directed how far, in former times, the ancient high watermark extended inland, and there would have been no need to try these issues at all. Upon that inquiry

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the onus, I apprehend, would have been upon the Crown. But the defence that has been raised prevents an inquiry of that nature from being of any use, until the first question is determined.

The first question must be determined before I can direct any inquiry as to the limits of the foreshore in former times, and it can only be determined by issues framed so as to raise the question.



There will be a decree directing issues in the form proposed on behalf of the Crown, but reserving all further questions.

Decree accordingly.

V. C. WOOD,
 April 17th.
 LORDS JUSTICES,
 April 23rd.

*Evidence—
 Affidavit sworn
 in a foreign
 Country—No-
 tary Public—
 Signature of
 Notary—No-
 tarial Seal—
 15 & 16 Vict.
 c. 86, s. 22—
 Judicial Cogni-
 zance—Prac-
 tice.*

IN RE EARL'S TRUST.

THE Clerk of Records and Writs objected to file a document, purporting to be an affidavit sworn before a notary public for the county of *Hertford*, in the state of *Ohio*, in *America*, and bearing a seal purporting to be the notarial seal for that county, upon the ground that the jurat was insufficient, inasmuch as there was nothing to show that the person before whom the document was represented to have been sworn was, in fact, a notary public.

Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen, the signature of the notary must be verified before the affidavit can be filed, unless by consent; and the Court cannot take judicial cognizance of the notarial seal alone as a sufficient verification.

Mr. *Collins* now applied for leave to have the document filed as an affidavit, citing *Haggitt v. Iniff*(a).

(a) 5 D. M. G. 910.

The VICE-CHANCELLOR.—In that case there was a certificate under the official seal of our own consul at *New York*, that the person before whom the affidavit was sworn was a notary public.

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Mr. *Collins* submitted that the notarial seal was sufficient verification (a).

The VICE-CHANCELLOR, after referring to the Registrar, said he would inquire into the practice in such cases.

On a subsequent day his Honour said, he had made inquiry into the practice, and found that he could not direct the document to be filed without an affidavit, or such a certificate as in *Haggitt v. Iniff*, verifying the signature of the alleged notary public.

Judgment.

The official seal of a notary public of a foreign country not under the dominion of the Queen was not one of which this Court could take judicial cognizance.

Upon the matter being brought before the LORDS JUSTICES, their Lordships required the attendance of Mr. *Murray*, of the Record and Writ Clerks' Office; and upon his stating that the document might be filed as an affidavit by consent, the argument was not proceeded with.

LORDS JUSTICES (b).
April 23rd.

Their Lordships said, it was clear that the case was not within the 22nd section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, or the other Acts relating to the admissibility of evidence.

(a) 15 & 16 Vict. c. 86, s. 22.

(b) Ex relatione Mr. *Collins*.

1858.

May 4th &
5th.Income Tax—
Annuity—Will
—16 & 17
Vict. c. 34.

Testator, by his will, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500*l.* "free from legacy duty and other deductions."—*Held*, that the annuity was subject to income tax under the Act 16 & 17 Vict. c. 34, to be paid out of the annuity itself.

SADLER v. RICKARDS.

THE testator, by his will, dated 1854, devised and bequeathed his residuary real and personal property to trustees, upon trust, to convert and invest the proceeds as therein mentioned; and he declared that his trustees should, out of the annual income arising from such investments, pay the annual sum of 500*l.*, "free from legacy duty and other deductions," to his wife during her life; and subject thereto, he directed his trustees to apply such income upon trusts for the benefit of his children.

The question was, whether the annuity was subject to income-tax.

Mr. *Haddon* appeared for the trustees.

Mr. *Beales*, for the widow, contended that the annuity was not subject to income tax. The question depended upon the construction of the Act of 1853 (*a*), not upon the Act of 1842 (*b*), by which the original property tax was imposed. Had it arisen under the Act of 1842, the tax must have been paid by the widow. But that was upon the ground, that, by the 102nd section of the Act of 1842, the tax was a charge upon the annuity itself—"The thing that is given is the thing that is to pay the tax," per Sir L. *Shadwell*, Vice-Chancellor, in *Wall v. Wall* (*c*);—or upon the person himself, *Lethbridge v. Thurlow* (*d*). Under the recent Act, it is not a charge upon the annuity itself.

The VICE-CHANCELLOR.—Does not the 1st section of

(*a*) 16 & 17 Vict. c. 34.

(*b*) 5 & 6 Vict. c. 35.

(*c*) 15 Sim. 520.

(*d*) 15 Beav. 339.

the Act of 1853 also make it a charge upon the annuity itself?

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IN RE EARL'S
TRUST.
Argument.

Mr. Beales.—But, it is to be paid by the person paying the annuity, and the word is to “deduct.” By the 10th section the person liable to pay the annuity is “to *deduct* and to retain thereout the amount of the rate of duty, and shall be acquitted and discharged of so much money as such *deduction* shall amount to, as if the amount had actually been paid” to the annuitant. Here the direction in the will is to pay the annuity “free from legacy duty and other deductions;” except the income tax, there is no such deduction; therefore the testator must have meant the 500*l.* to be paid in full, free from income tax.

The VICE-CHANCELLOR.—The 40th section only says that the person liable to pay shall be “entitled and authorised,” not “compelled,” to deduct the tax; and if he does deduct, he is to be allowed it.

Mr. Beales.—But trustees are liable to penalties if they do not make the deduction, and the state gets the tax immediately from them. Under the former Act there were none of those provisions.

Mr. James, Q. C., and Mr. Jessel, for the children entitled subject to the annuity, declined to contest the point.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have considered this question, and I cannot find room for any substantial distinction between the two Acts of
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IN RE EARL'S
TRUST.
Judgment.

Parliament that were referred to, or between the cases that were cited and the present. In both of these cases the words were fully as strong in favour of the annuitant as here.

Under these circumstances, without going into the question how I should have decided the point in the absence of those authorities, I must hold that this annuity is subject to income tax under the recent Act, and the tax must be paid out of the annuity itself.

1858.

IN THE MATTER OF THE JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849;

March 17th &
18th.

AND OF

THE ATHENÆUM LIFE ASSURANCE SOCIETY.

RICHMOND'S CASE, AND PAINTER'S CASE.

THE *Athenæum Life Assurance Society* was projected and established in the year 1851, and received its certificate of complete registration as a joint stock company on the 14th of May in that year.

Joint Stock Companies—Contributories—Fraud—Tampering with Deed.

The deed of settlement of the company provided that

Three persons, who had taken shares in a joint stock

company, proved, that, when they signed the company's deed, it contained a false sheet (which had been fraudulently inserted, and to all appearance formed an integral part of the instrument,) limiting the liability of shareholders to the amount of their shares; whereupon, in winding up the company and settling the list of contributories, they were released:—*He'd*, that their release did not affect the liability of those who executed the deed after the false sheet had been removed and the deed restored to the form in which it was originally registered, notwithstanding the latter had executed the deed upon the faith of those three persons being shareholders.

Distinction, in this respect, between joint stock companies and private partnerships.

Fraudulent and irregular Increase of Capital—Acquiescence.

The capital of a joint stock company was fixed at 10,000*l.*, but with power for a general meeting of the shareholders, duly convened according to certain forms, and by a majority of two-thirds of the then shareholders, to increase that amount to 100,000*l.* No such meeting was held, but a false entry was made by the chairman in the minute book of the company, stating, that, at an extraordinary general meeting of the company, it had been resolved to increase the capital from 10,000*l.* to 100,000*l.* The capital having been de facto increased, new shares having been issued and taken, profits having been made upon the increased capital, and dividends paid on such profits among all the shareholders for four years—*Held*, that the shareholders must be taken to have acquiesced, and could not now object to the irregular manner in which the shares had been increased.

Cancelling Shares—Powers of Directors—Ultra Vires—Fraud.

A director of a joint stock company proposed to his co-directors, that, for the benefit of the company, each of them should take a certain number of shares to be held in trust for the company; and, to set the example, he signed the deed for 2000 shares. No note of the proposal was entered on the minutes, nor were the shares handed over to him. No other director followed his example; but, subsequently, he being still a director, his name was returned to the stamp office for the shares. Afterwards, having ceased to be a director, and having reason to know that the company was in failing circumstances, he procured his shares to be cancelled by the directors:—*Held*, upon the terms of the company's deed of settlement, that this was ultra vires on the part of the directors, they having no power to cancel or diminish the capital, but only to forfeit shares for the benefit of the company, and was a fraud on the part of the shareholder, who was accordingly held to be a contributory in respect of those shares.

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the capital of the company should be 10,000*l.*, in shares of 1*l.* each, but with a power for a general meeting of the shareholders, duly convened for that purpose by notices transmitted to the shareholders fourteen days previously, not less than fifty shareholders being present, by a majority of two-thirds of the then shareholders of the company, to increase that amount of capital to 100,000*l.*

The 38th clause of the deed declared that it should be competent to the directors to exercise certain general powers, "and generally, when the deed was silent or did not otherwise provide, to act in the direction of the concerns of the company in such manner as in their absolute discretion they should think most conducive to the interests of the society."

The 95th clause provided, that, in case any shareholder should refuse to pay any call or instalment made or called for, as there referred to, with the interest (if any) payable thereon, and should continue in such default for the space of two calendar months after the day appointed for payment of such call, the manager should send to every such shareholder a notice in writing, specifying the amount due, and requiring payment thereof within twenty-one days from the date of such notice, on pain of forfeiture; and if such amount should not be paid within the time so specified, it should be lawful for the directors to declare the shares in respect of which such instalment and interest (if any), or any part thereof, should then remain unpaid, to be forfeited, and the same should be forfeited accordingly to the use of the society.

The 98th clause empowered the directors either to retain or to sell, for the benefit of the society, all such shares as should be declared forfeited.

Under date the 16th of May, 1851, an entry was found in the minute book of the company, in the handwriting of the chairman, and signed by him, from which the following is an extract:—

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“At an extraordinary general meeting of the shareholders of the *Athenæum Life Assurance Society*, held at the Company's offices on the 16th day of May, 1851,

“The Rev. *J. Bartlett* in the chair,

“Resolved,—I. That the capital stock of the society be increased from 10,000*l.* to 100,000*l.*

“Resolved,—II. That 1400 shares be awarded to the original promoters of the society.

“Signed, *J. Bartlett*, Chairman.”

Notwithstanding this minute was entered and signed by the chairman of the society, it now appeared that no such meeting was ever held, nor were either of such alleged resolutions ever, in fact, passed.

In the interval between the 14th of May and the middle of the month of July following, some person or persons unknown fraudulently inserted in the deed a skin of parchment, upon which was engrossed a clause, to all appearance forming an integral part of the deed, and purporting to limit the liability of the several subscribers to the deed to the amount of their shares. A prospectus also, with the names of the secretary and several of the directors annexed to it, was printed and publicly circulated, advertising to the public the advantages of the society, particularly as regarded the limitation of the liability of shareholders by the clause above mentioned, which it set out in extenso, as being an extract from the deed. Agents were then em-

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played on behalf of the company, to take the deed into the country, to invite the public to become shareholders, and to procure their signatures to the deed.

In July, 1851, the deed, with the false skin apparently forming an integral part of it, was accordingly taken into the country; and on the 5th of October, 1852, it was finally returned to *London* into the hands of the directors.

Upon examination of the deed, in the month of October, 1852, the false skin was found to have been removed.

In the meantime many persons had signed the deed, and, eventually, considerably more shares than the original capital of 10,000*l.* were subscribed for and issued; the company prospered; and from 1851 to 1855, dividends were paid to all the shareholders on the increased capital.

In the summer of 1855 the company was in embarrassed circumstances. In December in that year, a committee of investigation sat to inquire into the state of its affairs. In January, 1856, all the directors resigned, the committee were elected in their stead, and, a few months afterwards, they passed a resolution that the company should be wound up. Shortly afterwards, an order was made for winding up the company under the above-mentioned Acts.

In settling the list of contributories, it was determined by the Vice-Chancellor in chambers, that a Mr. *Cox*, a Mr. *Naylor*, and a third gentleman, who had signed the deed previously to October, 1852, ought not to be placed upon the list, it being proved to his Honour's satisfaction that they had signed the deed while the interpolated skin formed, to all appearance, an integral part of that instrument.

The questions raised by the present motions were, as to the liability of two persons named *Painter* and *Richmond*.

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Painter had been placed on the list of contributories for 350 shares, part of the estate of *Elizabeth Hockley*, deceased, of whom he was administrator, and on which all calls had been paid. It appeared that *Elizabeth Hockley* had signed the deed in 1853, after the false skin had been removed.

Richmond had been placed on the list for 2100 shares, under the following circumstances :—

On the 23rd of February, 1852, he had purchased and signed the deed for 1000 shares, which he eventually sold, and as to which no question now arose. He was immediately elected a director of the company. In October, 1852, he signed the deed for 2000 more shares, under circumstances which, in the opinion of the Court, precluded him from insisting that the deed was then in an interpolated condition. As to these shares he deposed to this effect, that, in October, 1852, being then a director, and holding the 1000 shares, he proposed to his co-directors that as 35,000 shares had then been subscribed for, they should limit the issue to 50,000, and that the directors should subscribe for the 15,000 still remaining unissued, and hold them among themselves, but in trust for the company, in order to keep a check upon the officers of the company, who were granting them too freely; that he himself, to set the example, subscribed for 2000 shares; but none of his co-directors followed his example; and after some discussion, from time to time, the scheme was abandoned; that, under these circumstances, he considered the whole transaction null; and the fact of his having subscribed for the 2000 shares did not recur to his mind till

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June, 1855, when, on searching the Joint Stock Registration Office, in consequence of hearing that the company was likely to come to mischief, he found his name returned as the holder of 3000 shares.

No minute appeared in the minute-book of the company in reference to the 2000 shares, or to the proposal above mentioned. The shares were not handed over to *Richmond*, nor did he make any payment upon them; but in February, 1853, he being still a director of the company, a return was made to the Stamp Office, in which he was returned as the holder of 3000 shares.

In August, 1854, he withdrew from the direction; and about the same time the directors, finding that he was proposing to sell the 1000 shares, in order to prevent his doing so, gave him a bond, under the seal of the company, purporting to indemnify him from all liability in respect of those shares.

In June, 1855, finding that he had been returned to the Registration Office as the holder of the entire number of 3000 shares, and having heard that the company were likely to come to mischief, and that there were already an execution against the company's effects, and four or five judgments outstanding against the company, he applied to the manager to get the 2000 shares cancelled. The directors thereupon, and at his suggestion, made a call of 5s. per share on the 2000 shares. Notice of the call was sent to him by the manager, with a note to him from the latter, to the effect, that the board thought that the best way to solve all difficulties. The call was not paid; and on the 16th of August, 1855, the manager wrote to *Richmond*, informing him, that his shares had been forfeited.

In January 1856, to qualify himself to sit as a director,

Richmond purchased and signed the deed for the remaining 100 of the 2100 shares with which he was now charged.

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It appeared, that, after he had signed the deed for the 2000 shares, he maintained, when complaints were made of the interpolation of the false clause, that such a fraud was impossible, and that no such clause had ever been inserted.

Mr. *Daniel*, Q. C., and Mr. *Roxburgh*, now moved, on behalf of *Richmond*, that his name should be removed from the list of contributories in respect of the 2000, part of the 2100 shares, for which he had signed the deed, for the following reasons :—

Argument.

First. He had signed for the shares in question in October, 1852, and there was no evidence that the false skin had then been removed, and the deed restored to its original state.

The VICE-CHANCELLOR.—Long after he signed the deed for those shares, he maintained that the clause had never been inserted in it.

Mr. *Daniel*.—But the deed was destroyed as a deed of settlement of the company the moment the false skin was inserted; and even if *Richmond* executed the deed after it was restored to its original state, he is not bound by its provisions. If those who executed the deed while the false clause remained interpolated have been released from being contributories, those also should be released who executed it on the faith of their execution. This is a partnership. The number of partners is immaterial. Suppose, then, a case of four partners, and, after two have signed the deed of partnership, the third is entrapped into signing by the in-

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section of a false clause, which is then removed—would not the fourth, signing after its removal, have a right to say, "I signed a partnership with three others, and I object to be held bound to become a partner with but two." Here the deed is no longer the same as *Richmond* signed. He signed a deed to which three persons were parties who are now held never to have been parties—a deed which made him a member of a partnership in which persons were partners who are now held never to have been partners. The deed he signed, the partnership he joined, no longer exist.

Secondly. He should be released on the ground of the irregular and fraudulent manner in which the capital, of which these shares formed part, was increased. To increase the capital lawfully, the deed required the sanction of two-thirds of the shareholders present at an extraordinary general meeting of the shareholders, duly convened according to the forms specified in the deed. None of those forms were observed. No meeting was ever held. The capital was irregularly increased; and it is competent to every shareholder to dispute the transaction.

The VICE-CHANCELLOR. — Was not *Richmond* a director?

Mr. *Daniel*.—But he was not cognizant, as director, of frauds, much less of this which was perpetrated before he joined the direction.

Thirdly. He is entitled to exemption, upon the ground that the transaction with regard to the 2000 shares was never completed, and the shares have since been cancelled. The proposal was, that each director should take 2000 shares for the benefit of the company, to be held in trust for the company. *Richmond* signed for 2000, but none

of his co-directors followed his example; the scheme was abandoned, and he never heard of it again till his name was discovered in the Registration Office returned as the holder of the shares: immediately upon which he procured them to be cancelled. This he was entitled to do, for it was never intended that they should be held by him, except for a specific purpose; and that purpose, owing to the want of co-operation on the part of his co-directors, never became possible. Then, as to the powers of the directors to cancel the shares, the case is clear: for, by the 95th clause of the deed, they had power, in the event which happened, to declare shares to be forfeited; and, if that clause, for any reason, should be held inapplicable, by the 38th clause they had a general power, wherever the deed was silent or did not otherwise provide, to act in the direction of the concerns of the society in such manner as they, in their absolute discretion, should think most conducive to the interests of the society.

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Upon this part of the case they cited *Beresford's case* (a), *Davidson's case* (b), and *Cockburn's case* (c), the case of *Robinson's Executors* (d), and the case of *Meux's Executors* (e).

Mr. Daniel, Q. C., and Mr. Pigott, now moved that *Painter* should be excluded from the list of contributories, relying upon the same arguments as those first adduced in support of the previous motion, and citing *Sheppard's Touchstone*, *Pigot's case* (f), *Seaton v. Henson* (g), *Doe d. Lewis v. Bingham* (h).

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(a) 2 M'N. & Gor. 197.

(b) 13 Jur. 722.

(c) 4 De G. & Sm. 177.

(d) 2 D. M. G. 517.

(e) Id. 522.

(f) Rep. Part xi. 26 b.

(g) 2 Lev. 220.

(h) 4 B. & Ald. 672, 677.

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Mr. *Rolt*, Q. C., and Mr. *W. D. Lewis*, contra, were not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The circumstances of this case are very painful. The deed of settlement belonging to the company is proved to my satisfaction to have been tampered with since its first registration in May, 1851. The deed was then registered in the form in which it now stands ; but in July following, or between May and July in that year, some person or persons, it does not appear who they were, fraudulently inserted in the deed a sheet of parchment containing a clause purporting to limit the liability of all subscribers to the deed to the amount of their shares. The attention of the public was called to this clause by a printed prospectus announcing the fact, and setting out the clause in question, which it represented as an extract from the deed ; and to that prospectus were annexed the names of the secretary and of several other persons who then acted as directors of the company. In July, 1851, the deed, with the interpolated sheet to all appearance forming part of it, was sent into the country to be signed ; and on the 5th of October, 1852, it was finally returned to *London*, and came again into the hands of the directors.

How long, during the interval between July, 1851, and the 5th of October, 1852, the interpolated sheet remained in appearance part of the deed is not clear ; but three persons,—Mr. *Cox*, Mr. *Naylor*, and a third person,—are distinctly proved to have signed the instrument while it remained in that condition. The result has been, that those three persons, having proved that they executed the instrument when it contained to all appearance a clause, which, in fact, did not then or at any other time form part of it, have escaped from having their names placed upon the list of

contributories, the contract they entered into not being of the description specified in the act of provisional registration, or upon which the business of the company was ~~carried~~, in any sense, carried on.

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I have now to consider the effect of that state of circumstances with reference to subsequent subscribers to the deed.

As regards original subscribers, who signed the deed in its original state, and before it had been tampered with, it is clear that the subsequent alteration did not invalidate their signature, or affect the transaction as against them. In *Doe d. Lewis v. Bingham* (a), the question was, whether a deed, which was produced, and which had evidently been tampered with by interlineation and otherwise, was valid as to persons who had executed it before its alteration; and the Court held that it was; for it would be absurd to say, that the alteration of a deed would render it invalid against one who had previously executed it, unless his position was altered, for even the destruction of the deed would not have that effect. The cancelling, or even destruction of a deed, does not prevent an estate from passing. In that case, therefore, it was held that the alteration had no effect on those who previously executed the deed.

But the question here—and a very singular one it is—relates to those who signed the deed under these circumstances. Three persons having executed the actual instrument, but with a clause interpolated which rendered it not the instrument, as between them and the company, which bound the rest of the shareholders inter se,—at some subsequent period that clause is removed, and, after its removal, the instrument is executed by a vast number of persons. But all the persons who so executed the instrument after

(a) 4 B. & Ald. 672, 677.

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the removal of the interpolated clause,—whenever that removal took place,—executed a deed which is practically the identical deed which was registered according to the provisions of the Joint Stock Companies Acts, and upon which the partnership was carried on from the year 1852 to 1855. During the whole of that interval, the deed appears to have been in its original state, and the parties appear to have been carrying on the partnership in the manner in which the deed contemplated that it should be carried on, with this only difference, that certain persons whose signatures appeared subscribed to the deed were not, as I have since held, partners in the company or bound by the deed.

It was argued, that this difference is most material, and materially affects the position of those who subscribed the deed after the three gentlemen whom I have held not to be contributories; that all who so subscribed the deed subscribed a deed to which those three gentlemen purported to be parties—a deed which purported to be a deed of partnership in which those three gentlemen were partners; whereas it now turns out that they were not.

That circumstance certainly introduces a question of some nicety, and, perhaps, of some degree of novelty; but it appears to me that you cannot test a case of this description upon the same principle which you would apply to a case of private partnership of four or five partners only. In a partnership of four partners, if the third had been entrapped into executing a deed of partnership by the insertion of a false clause, which was afterwards removed, it might be argued that the fourth, signing after its removal, would have a right to say, "I joined a partnership of three others, and I object to be held bound to become a partner with only two others." But these joint stock companies differ materially in many respects from ordinary partnerships, and it is impossible to put the two upon the same footing; and

it is to be considered, whether, because three, four, or five persons are entitled to be released from being members of a joint stock company, upon the ground that they were entrapped by fraud into signing a deed, which in truth omitted what it professed to state and they intended to contract for, their release is to have the effect of liberating four or five hundred other shareholders, who afterwards sign a deed expressing exactly what they intended to state, and who then proceed to carry on the partnership upon that footing, simply because they miss five, four, or three partners, or even one partner—for the argument must go to that extent,—I apprehend it would be introducing a very startling and a very novel doctrine. In many of these cases of joint stock companies, individuals have been released in consequence of their having been fraudulently induced to become members; and yet, in no one of them, has it been held, that, because individual members have been released, hundreds who have not been deceived—who have executed only that deed which they expected to execute—can claim to be released, simply because they have one partner less than they intended.

Such a doctrine applied to joint stock companies would be as startling as novel; and it appears to me, that it could not be applied to the case before me without leading, to the full extent, to the consequences I have suggested. Here only three persons appear to have executed the deed during the time the false sheet remained interpolated. In cases like these fraud cannot be presumed, and those who say they have been deceived and defrauded must prove that they have been so, and those only who do so prove that they have been deceived and defrauded can escape.

Monstrous, therefore, as is the fraud in this case, and leading as it does to the exclusion of three persons already from the list of contributories, I cannot hold that the other

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members of this numerous partnership who signed the deed after it was restored to its original state, and after the removal of that which defrauded the others, are entitled to escape, merely because they have lost three contributories, whom they believed to be members, like themselves, of the company.

As regards *Painter's* case, it is clear that his testatrix executed the deed after it had been restored to its original condition. The deed was in its original condition at the close of the year 1852, and she did not execute it till 1853; and there is nothing to show that she supposed it to contain any clause limiting the liability of shareholders, or varying the nature of the partnership as constituted by the deed in its original form.

Richmond's case stands somewhat differently as to the execution of the deed. He executed it, in respect of the 2000 shares from which he now seeks to be relieved, in October, 1852; but at present I must assume—and there is sufficient ground for assuming—that he also executed after the deed was restored to its original condition. [His Honour mentioned the facts on which he founded this assumption, and proceeded:] And beyond that I have *Richmond's* own evidence against him, for, when the fraud was discovered, and complaints made to the directors on the subject, his reply throughout—and this was after he had signed the deed for the 2000 shares—was, that so abominable a fraud could never have been perpetrated, that the deed had never been so tampered with, involving, of course, this assertion, that he, too, had executed the deed in its original form, and without any such fraudulent clause. After that, it would be difficult for him to succeed in establishing that he executed the deed while the additional clause remained interpolated; and from what he has himself said, I must consider that he executed it under the

same circumstances as *Painter's* testatrix, namely, as it stands registered.

The next question with regard to *Richmond*—and it is one which affects *Painter* also—relates to the fraudulent increase of the capital of the company.

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The deed provided that the capital of the company should be 10,000*l.*, subject to a proviso, that it should be competent to a general meeting of the shareholders, by a majority of two-thirds of the shareholders duly convened for the purpose, as mentioned in the deed, to increase that amount to 100,000*l.* That being so, another scandalous fraud is perpetrated, traceable, in this instance, I deeply regret to see, to a clergyman who was chairman of this concern. He enters in the minute-book of the company a minute, in his own handwriting, purporting to be a minute of an extraordinary general meeting for increasing the capital of the company, and representing resolutions to have been duly passed at that meeting for increasing the capital to 100,000*l.*, concluding with a vote of thanks to himself as chairman—all entered by himself, and signed by himself as chairman. In that minute, so far as at present appears, there is not one word of truth. No such meeting ever took place, and the whole transaction is but another instance of the frauds that have been perpetrated in this concern.

It is quite true, that, inasmuch as it required the sanction of two-thirds of the shareholders present at an extraordinary general meeting duly convened, to increase the capital, there having been no such meeting, and the capital having, therefore, been irregularly increased, it was competent to any shareholder to dispute it, had he thought fit to do so. But the capital is *de facto* increased. *De facto* new shares are issued and taken, the company goes on and prospers, and from 1851 to 1855 dividends are made, and paid to all the

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shareholders, on the increased capital; and I think, upon that, it must be assumed that the original shareholders—the persons entitled to complain of the increase of capital—were content to abstain from inquiring into the mode in which it had been done. They accepted the subscriptions from the public, they made profits on them, and divided these profits, and without looking to the cases of partnership, which establish that partners by their dealing may dispense with the express provisions of their deed, it is clear that these original shareholders, having gone on for four years upon that footing, and dividing profits upon the increased capital, must be taken to have acquiesced in the irregular mode in which the capital was increased. The particulars of that transaction may have been unknown to them; but they knew the capital had been increased in fact, and were content not to inquire how it had been done. The shareholders cannot be considered as relieved from inquiring whether that general meeting had ever been held. Every shareholder must be supposed to have known that such a meeting could not be held without notice. Every shareholder must have known whether he had been invited to attend such a meeting or not; and to hold that these original shareholders did not acquiesce in the irregular mode in which this capital was increased, would be giving them an opportunity to do that which would be, in fact, a fraud upon all those who were admitted into the company as subscribers of the additional capital.

It seems to me, therefore, that neither *Richmond* nor *Painter* can claim to be released on the ground of the increase of capital.

Another ground upon which *Richmond* claims exemption in respect of the 2000 shares with which he is now charged is, that those shares were cancelled by the directors.

In reference to that part of his case, the facts are these:

Originally, in February, 1852, he signed the deed for 1000 shares, which he afterwards sold, and as to which no question now arises. Having paid for those shares, and signed the deed for them, he afterwards became a director of the company. He appears to have been a person in whom the other directors placed considerable confidence, in respect of his position and intelligence; and in October, 1852, it seems, according to his own evidence, to have occurred to him as desirable, that the directors should take a certain number of shares among themselves to prevent improper jobbing, and with the view ultimately of converting the company from a share company to a mutual insurance company; and accordingly he proposed that every director should take 2000 shares. No minute appears to have been entered on this subject; but *Richmond* signs the deed for 2000 shares. He did that in October, 1852. He says, the idea was, that the directors were to hold the shares to be so taken by them for the benefit of the company; but the directors did not enter any note to that effect upon the minutes, and the result was, as between *Richmond* and the other shareholders, that he was in a position to deal with the 2000 shares as his own. The shares were not handed over to him; but, in February, 1853, he being then himself a director, a return was made to the Stamp Office, in which he was returned for the 2000 shares, as well as his original 1000, so that he there appeared to all the world to be the holder of 3000 shares. In August, 1854, he withdrew from being a director. About the same time he talked of selling his 1000 shares; and then it was (although I do not say it is material to enter into that transaction), that he took a bond of indemnity from the directors, under the seal of the company, in respect of those 1000 shares, which they were averse to his selling. In August, 1855, the transaction occurred with reference to the cancelling of the 2000 shares for which he had signed in October, 1852. What took place was this:—He was registered as the pro-

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prietor of those 2000 shares; and, according to his own account, he was first led to consider his position in consequence of a friend suggesting to him that the company was not going on satisfactorily, that the clergyman was managing matters in a very unsatisfactory way, and if they did not take care they would come to mischief. He then began to consider his position; and in June, 1855, he sent to the Registration Office, and found himself registered for these 2000 shares. In the meantime, in addition to what his friend had suggested to him, he is further informed of this fact, that there was actually an execution against the company's effects, and that four or five judgments were then outstanding against the company. He then thinks it right to get rid of his shares, and it occurs to him that his mode of doing so will be by means of the clause relative to forfeiture contained in the deed; and he himself suggested the plan for getting rid of his liability on that footing.

It was argued, that, looking to the original agreement upon which he signed for the 2000 shares, he was entitled, as between himself and the directors, to have those shares cancelled, because, in truth, it was never intended that they should be held by him, except for a specific purpose. But the answer is, that he has not dealt upon that footing; there is no trace of the shares having been taken upon that footing, nor does he attempt to get rid of them upon that ground.

Then, the observations of Lord *St. Leonards*, in the case of *Robinson's Executors* (a), are strictly applicable; and the decision in that of *Meux's Executors* (b) does not apply. In the latter case, Lord *St. Leonards* notices the fact, that the whole transaction relative to the 500 credit shares had been kept private, the shareholders knew nothing about it, it was known only to *Meux* and his co-directors; and when

(a) 2 D. M. G. 517.

(b) Id. 522.

his 500 credit shares were cancelled by his co-directors, no one had been misled or injured by what had previously taken place, but every one stood exactly as he had stood before. Then,—and it was upon this ground that Lord *St. Leonards* mainly relied,—the executors of *Meux* were told by those very directors who had joined with the deceased in the irregular proceeding, that their testator held 20 shares,—which the Lord Chancellor held to be a representation that he held 20 shares and no more,—and upon the faith of that representation they distributed the assets; and yet, seven years after the assets had been distributed by the executors, upon the faith of the representation so made to them by the directors, the claim was brought in respect of the whole of the 500 shares. Under those circumstances, Lord *St. Leonards* held the executors discharged from all liability in respect of those shares: but he admitted the case to be one which tried the doctrine of law and equity very strongly, *Meux* himself having been one of the original wrongdoers; and that he might have held otherwise had the claim been asserted immediately after the occurrence of the transaction.

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In the present case, I find none of those incidents on which Lord *St. Leonards* relies in the case of *Meux's Executors*. Here the transaction as to the 2000 shares is not kept private from the general body of shareholders. *Richmond* is published to the world as the holder of those shares, and the only question is, whether he has got rid of them.

Several clauses in the deed have a bearing on this part of the case, but the clause immediately relating to forfeiture is the 95th. By that clause it is provided, that in case any shareholder shall refuse to pay any call or instalment made or called for as there referred to, with the interest (if any) payable thereon, and shall continue in such default for the space of two calendar months after the day ap-

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pointed for payment of such call, the manager shall send to every such shareholder a notice in writing, specifying the amount due, and requiring payment thereof within twenty-one days from the date of such notice, on pain of forfeiture; and if such amount be not paid within the time so specified, it shall be lawful for the directors to declare the shares, in respect of which such instalment and interest (if any) or any part thereof shall then remain unpaid, to be *forfeited*, and the same shall be *forfeited* accordingly to the use of the society.

Then, by the 98th clause, "the directors are empowered either to retain or sell, *for the benefit of the society*, all such shares as shall be declared forfeited."

The meaning of these two clauses is clear. There is no power whatever given to the directors to cancel any shares. The deed contemplates the possibility of the directors thinking it for the benefit of the company to declare shares to be forfeited—not for the purpose of relieving any shareholder from liability—but for the benefit of the company. It contemplates that a time will come when the shares will be of more value; and it provides, that, when that time has come, and when it will be for the benefit of the company, the directors shall have power to deal with the shares and sell them; but it gives them no power whatever to cancel a single share, or to diminish in any way the capital of the company.

I was referred subsequently to the 38th clause, which vests certain general powers in the directors, and concludes by empowering them "generally, when these presents are silent, or do not otherwise provide, to act in the direction of the concerns of the society in such manner as in their absolute discretion they shall think most conducive to the interests of the society." But in reference to that clause, it

is clear that the directors did not think it "conducive to the interests of the society" to release *Richmond* in respect of these shares, because they had, only a very short time previously, given him a bond of indemnity to induce him to hold them. No such notion ever entered their minds. *Richmond* had evidently great influence with them. They wished to do what was right between themselves and him, and for his benefit they released him and cancelled his shares, not forfeiting them for the benefit of the society, or with the view of transferring them to others, or selling or disposing of them, but simply attempting to do that which they had no power to do under the deed. And having so done, they return him to the Registration Office, in their next return, as holding only his original 1000 shares. I apprehend that this transaction on the part of the directors is entirely *ultra vires*, the whole object of it being to release *Richmond*, which they were no more competent to do than they were to release any of the ordinary shareholders in the company. The whole transaction, therefore, was simply void.

With regard to *Cockburn's case* (a), the first question there put by the Vice-Chancellor was this :—"Is there any evidence of an intended fraud, or of the company having been in failing circumstances, and Mr. *Cockburn* wishing to be therefore out of it?" Was this company, I ask, in failing circumstances when *Richmond* procured these shares to be cancelled? There was an execution in the house, and four or five judgments outstanding against the company. I do not wish to use a harsh expression with reference to one who appears in this instance to have been an injured man ; but, looking to these circumstances, this certainly is a case in which, to the eye of this Court, there is fraud. That a gentleman who had been a director in the company, and only ceased to be a director in August, 1854, who held

(a) 4 D. G. & Sm. 177.

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1000 shares, and had a great interest in the company, and was of such weight and influence with the directors, that they gave him a bond of indemnity to induce him to retain his 1000 shares, should employ that influence to procure those who had been his brother directors to cancel other shares of his, at a time when he knew the company to be in failing circumstances, was a fraud in the contemplation of this Court.

I hold that the cancelling of these shares was beyond the powers of the directors, and therefore *Richmond* must remain on the list in respect of the 2000 shares, as well as in respect of the 100 shares that he purchased afterwards.

The result is, that the list will remain as it now stands as regards both *Richmond* and *Painter*, and both the applications will be refused.



March 26th.

RENDALL v. THE CRYSTAL PALACE COMPANY.

Charter—Con-
 struction—
 Forfeiture—
 Lord's Day—
 Tickets of Ad-
 mission—Mo-
 ney Payment—
 Surrender of
 Shares—Pub-
 lic Company.
 —

THE Plaintiff was a shareholder in *The Crystal Palace Company*. The Defendants were the company and its directors.

The bill stated, that, by letters patent or royal charter of incorporation, under the great seal, dated 16 Vict., the

A charter of incorporation was granted to the company on condition that no person should be admitted to the company's building or grounds on the Lord's day in consideration of any money payment, whether made directly or indirectly, unless the sanction of the legislature should have been obtained. The company having obtained an Act of Parliament, authorising their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the company from any condition contained in the charter, advertisements were issued by the directors, offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days:—*Held*, that the admission of any person on Sunday by means of such a ticket as proposed would occasion a forfeiture of the company's charter; and upon bill filed by a shareholder, the company was restrained from accepting a surrender of any shares in exchange for such tickets of admission.

company was incorporated, subject to the conditions contained in their deed of settlement and in the said letters patent; and it was thereby declared, that the said charter was granted on the condition that no spirituous or other fermented or intoxicating liquors should be furnished to the persons visiting the building or grounds of the company: and that no person should be admitted to the said building or grounds on the Lord's-day in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the Legislature should have been obtained for admission on such consideration, and then only from the time warranted by the Act of Parliament.

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The bill then stated, that, by *The Crystal Palace Company's Act*, 1856, after reciting, amongst other things, that it was expedient that the company should be enabled to grant to the proprietors of shares or stock therein, tickets of admission to their buildings and grounds for life, or for certain definite terms of years, in lieu of the interest in the capital of the company held by the proprietors who might be willing to acquire such tickets of admission, it was enacted by the 11th section as follows:—"It shall be lawful for the directors to agree with any proprietor absolutely entitled to shares or stock in the company for the conversion thereof, or of any part thereof, into a ticket of admission into the buildings and grounds of the company, for such proprietor, or the nominee of such proprietor, either for life, or for such term of years as may be determined on, and subject to such conditions as may be agreed on; and the shares or stock so converted shall be extinguished, and cease to form part of the capital of the company, or to be entitled to any interest or dividend, or to confer the right of attending the meetings, or voting at the meetings of the company, unless these rights shall be reserved in the agreement between the company and such proprietor: Provided always, that no such agreement shall be entered into, or

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conversion of shares into life-tickets be effected, unless a majority of the proprietors of the company in general meeting assembled, with due notice of the matter, shall have given general authority to the directors to effect such conversion." And by the 14th section it was enacted as follows:—"Provided always, and it is hereby declared, that nothing herein contained shall alter or invalidate the said deed of settlement or charter, or shall relieve the company from any covenants or conditions contained therein respectively, excepting in so far as the said deed and charter are expressly varied by this Act."

The bill then stated, that, in December, 1857, the directors circulated among the shareholders their report, dated 7th of December, 1857, to the general meeting of shareholders, to be held on the 17th of December, 1857; in which, after setting out the 11th section of the company's Act of 1856, they stated, that, in conformity with the power conferred by that section, they proposed, that, in respect of every ordinary and preference share which should be agreed to be extinguished in terms of the above-mentioned section, a ticket should be issued to the proprietor of such share, entitling him to a certain number of gratuitous admissions to the palace and grounds on all ordinary shilling days; that after the full number of admissions for which it was issued had been made use of, the ticket should expire and be returned to the company; the ticket to be available without the necessity of the proprietor's personal presence, and to be allowed to be lent and used by a party of persons of any number at a time, provided the number did not exceed that of the admissions still due to the ticket; that the right to use the tickets should not extend beyond three years from their issue; that 60 admissions for an ordinary share, and 120 for a preference share, would be a fair number to be adopted for the first issue; and that a list should be at once opened: after which the report proceeded as follows:—

"Admission on Sundays.—The directors further recommend, that a resolution of the board be passed, authorising admission by these tickets to the palace and grounds on Sunday afternoons, after half-past one o'clock, as a gratuitous privilege, and without any money payment to be made, directly or indirectly, to the company for such privilege, the number of persons admitted by each ticket being, however, recorded upon it." The bill stated, that this report was read to the general meeting of the shareholders held on the 17th of December, 1857, when a resolution was passed, authorising the board of directors to agree with any proprietor for the conversion of his shares in the company into tickets of admission to the building and grounds of the company, pursuant to the 11th section of the company's Act; and that the board of directors should be requested to pass a resolution authorising admission by these tickets to the palace and grounds on Sunday afternoon, as a gratuitous privilege, and without any money payment to be made, directly or indirectly, to the company for such privilege.

The bill stated, that an advertisement had appeared in the *Times*; and a circular of such advertisement had been distributed to the shareholders, with a copy of the 11th section of the company's Act annexed, to the effect, that, pursuant to the resolution passed at the meeting of the 17th of December, and under the 11th section of the Act, the directors were prepared to receive applications for the surrender of shares in the company, in exchange for tickets of admission, on the following terms:—"Admission on ordinary days:—For each original share surrendered, a ticket authorising sixty admissions to the building and grounds on all ordinary days, when the price of admission is not more than one shilling; for each preference share surrendered, two similar tickets of admission. The directors can only receive applications for these tickets from a registered shareholder, but the tickets themselves will be made out to bearer. Admission on Sun-

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days:—In accordance with the opinion expressed at the last general meeting of shareholders, the directors have passed a resolution authorising admission by these tickets to the palace and grounds on Sunday afternoons."

The bill alleged that the Defendants had received many applications for the proposed tickets, and intended to issue such tickets, and to admit the holders to the building and grounds on the Lord's-day; but that the express sanction of the Legislature had never been obtained for the proposed admission, or for any admission, to the building or grounds on the Lord's day in consideration of any money payment.

The bill charged, that such admission would occasion the forfeiture of the company's charter of incorporation; and that many persons were watching to see whether there would be any violation of the condition against Sunday admissions, and intended to raise the question of the forfeiture of the charter in case this proposal should be carried into effect.

The bill prayed that the Defendants might be restrained from accepting the surrender of any shares or share in the company, in exchange for tickets of admission on the terms specified in the advertisement of the 17th of February, 1858, and from issuing any tickets of admission on such terms, and from admitting any person to the building or grounds on the Lord's-day in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the Legislature should have been obtained for admission on such consideration.

The Defendants demurred generally for want of equity.

The Plaintiff gave notice of motion for an injunction, as prayed by the bill.

Mr. *James*, Q. C., and Mr. *Hemming*, in support of the demurrer, contended, that, there being now an Act of Parliament enabling the company to convert shares into transferable tickets for life or years, the proposed issue of tickets of admission for every day, including Sunday, in exchange for shares, was not a violation of the conditions contained in the charter.

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Such conditions were always construed strictly : *Regina v. The Eastern Archipelago Company*(a); much more here, where the penalty was raised from a fine of 200*l.* (b) to the forfeiture of the entire property of the company, exceeding a million of money. And the condition in this charter did no more than repeat, but with far more severe and stringent penalties, the provisions of existing Acts for regulating places of public entertainment, and for preventing abuses or profanations of the Lord's-day (c). The course the Defendants proposed to take would not violate any of those provisions. They proposed to admit, not the public generally, but only a select class, which was not within any of those Acts. If shareholders accepted their proposal, the only result would be a conversion quoad such shareholders of their rights into privileges like those of the subscribers to the *Zoological Gardens*, who had always been admitted to those gardens on Sundays. The directors of this company had always the right to admit their friends gratuitously on Sunday. The company itself had always the right of admitting their shareholders gratuitously on that day; and if such admissions were not within the scope of the charter, what more mischief would result from the course now proposed by the Defendants?

It was true, that, when once a ticket was delivered to a

(a) 22 Law J., Q.B., 206; *S. C.*, 23 Id. 105, 106. (b) 21 Geo. 3, c. 49, s. 1.
(c) 25 Geo. 2, c. 36; 21 Geo. 3, c. 49.

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shareholder in exchange for his share, it might be sold by him out of doors, and the shareholder might receive money for it; but that was not a money payment made directly or indirectly *to the company*; and to bring the case within the prohibition of the charter, there must be some payment *to the company*; some money consideration must reach the hands of the company. The object of the prohibition was to prevent the company from covertly making money by such admissions. The word "indirectly" was meant to apply to an evasive mode of receiving money, *e. g.*, charging nominally for refreshments, but really for admission: *Bellis v. Burghall* (a), *Marks v. Benjamin* (b).

The VICE-CHANCELLOR.—These shares have a value in the market. The company, by purchasing them, extinguish a debt.

Mr. James.—But the company cannot sell them again. They will be simply extinguished; and the effect of extinguishing them will not be to increase, even indirectly, the receipts of the company, or the amount divisible as profits. That amount will remain the same, but divisible among fewer shareholders. The consideration is not "a money payment," but the retirement of a partner.

Suppose leasehold premises, held by a partnership firm under a lease, providing that an assignment in consideration of any money payment, whether made directly or indirectly, without leave of the lessor, should work a forfeiture, and suppose one of the partners agreed with the rest to retire on condition of his being allowed to occupy the premises—could that work a forfeiture?

The *Solicitor General*, and Mr. *Busk*, for the Plaintiff, were not heard.

(a) 2 Esp. 722.

(b) 5 M. & W. 565.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have come to the conclusion that this demurrer cannot be sustained.

I have not been asked on either side to call in the assistance of a common-law Judge; nor do I think it advisable to do so, because the parties can have that assistance elsewhere, if it be desired. The case depends simply upon the provision of the charter and the single clause which has been referred to in the Company's Act of Parliament.

The charter is very clear and distinct in prohibiting the use of these grounds or buildings on the Lord's day for any money-payment. It is expressly granted on this condition—"that no person shall be admitted to the building or grounds on the Lord's day in consideration of any money-payment, whether made directly or indirectly, unless the express sanction of the Legislature shall have been obtained for admission on such consideration, and then only from the time warranted by the Act of Parliament." It is exceedingly special: it does not even reserve to the Crown the power of relaxing the prohibition. It says, that nothing short of an Act of the Legislature shall have that effect.

I cannot take the view which was contended for in argument, that the clause in question was intended simply to import the provisions of the then existing Acts of Parliament with reference to the observance of the Lord's day. If it had been so intended, it would have been very simple to say so—nothing more would have been necessary; and, therefore, many of the observations which were made in argument upon the words "public entertainment" have no application here. In cases occurring under the Acts of Parliament that were cited, the authorities referred to

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may very possibly show that the prohibition is directed against entertainments given to the public generally, and open to all persons who come and pay their money; and that entertainments given not to the public generally, but to a particular class of persons, do not fall within the penal enactment: but those decisions have turned upon the expression "*public* entertainment" occurring in the Act. Here there is no such expression. The word "*public*" does not occur, and the admission of a single person would be within the prohibition. If a single person went down on a Sunday and was admitted by paying a shilling or a sixpence, or even a penny, the charter would be gone.

I concur so far with what was said in argument in reference to the words "*directly or indirectly*," that, in order to bring the case within the prohibition of the charter, there must be some money-payment coming into the hands of the company,—that what was contemplated was not to prohibit a money-payment made by other parties *inter se* out of doors, but some money-benefit resulting to the company.

Now, I will first suppose that there were no Act of Parliament in the case, and that the directors of the company had the power, which the directors of many companies have under their deed of settlement, of buying up shares for the benefit of the company. In that state of things, the directors say to a shareholder, "You have so many shares in the company, we find this clause with reference to the non-admission of persons on the Lord's day is inconvenient, and if you are inclined to sell us your shares on behalf of the whole company and transfer them to us, we will give not only to you, who will have ceased to be a shareholder, but to your friend or your nominee, an admission on so many days, including so many Sundays." That, I apprehend, would be clearly within the prohibition. Whether the

words "money-payment made directly or indirectly" extend to all cases of money or money's worth,—whether, for instance, they would reach the case of the presentation of a vase, or some other ornament, for the palace, I will not stop to inquire. But if the directors proposed to take a transfer of a single share to themselves on behalf of the company, and to admit the shareholder on the Lord's day, that would be clearly and distinctly receiving indirectly a money-payment. The share is not itself money, but it is immediately convertible, and saleable in the market at a certain price. It is given up, in distinct terms, for the privilege of that admission; and it would be a very narrow construction of the charter to say, that the prohibition is confined to admissions in consideration of payments made in actual cash, and does not extend to such as may be made in shares, not even (for the argument must go to that extent) in shares in the public funds, or the like.

In the present case, as I am told, the directors of the company have no such power, under their deed of settlement, to buy up shares for the benefit of the company; and, accordingly, they apply to Parliament and obtain a power under the 11th section of their Act to convert shares into tickets of admission to the proprietor or to his nominee, either for life or for such term of years as may be determined upon. And it is argued, that, if a person obtains a ticket of admission for his life, he would be entitled thereupon to claim his right on the Sunday as well as on any other day. But the provision in the 11th section of the Act must be coupled with the provision in the 14th section, "that nothing in the Act contained shall alter or invalidate the deed of settlement or the charter, or relieve the company from any covenant or condition contained therein, except in so far as the deed or charter are expressly varied by the Act." The Legislature have before them the charter, which says,—that no person shall be admitted to the

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building or grounds on the Lord's day in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the Legislature shall have been obtained for admission on such consideration. With that charter before them, they do not think proper to give such express sanction; and all that they enact is the provision in the 11th section as regards tickets of admission. Up to that time the practice of the company as regards tickets of admission had been to confine such admission to days not prohibited; and, the existing tickets of admission being confined to such days, when I find that Parliament by this 11th section empowers shareholders to part with their shares for "tickets of admission," it is impossible for me to assume that Parliament meant anything but the ordinary tickets of admission, which could not be made use of at all on the Lord's day. Still less can I make that assumption, when I find that the Legislature not only abstains from expressly sanctioning such admissions on Sunday, but also takes the precaution of saying in the 14th section of the Act, that nothing in the Act contained shall alter the charter, or relieve the company from any covenants or conditions contained therein, excepting in so far as the charter is expressly varied by the Act.

Such being the effect of the Act of Parliament, one is driven back to the original consideration, whether surrendering to the company a share which is saleable in the market—a share on which future dividends will be payable if the company prospers—and obtaining thereupon a ticket of admission on the Lord's day not only for yourself who have then ceased to be the proprietor, if you have only one share, but also for such nominee as you may choose to appoint, is not in effect obtaining a ticket of admission for money indirectly paid for the benefit of the company. It seems to me, that, if such a transaction is contemplated, the charter is placed in a degree of peril that entitles any share-

holder to call in the assistance of this Court to prevent the company from taking such a step.

I feel the less difficulty in determining the point, because, as was admitted, it can only be determined in a Court of law (except by taking the opinion of the judges beforehand for the assistance of this Court,) after the step has been taken by the company ; and if, after that, an adverse decision should be given, the charter would be gone, and that would be a destruction of the whole of the company's property.

As far as I can form an opinion upon the true construction of the charter, the effect of such a step would be a forfeiture of the company's charter. I must, therefore, overrule the demurrer.

Ordered accordingly.

The *Solicitor-General* then proceeded to open the motion for an injunction.

The VICE-CHANCELLOR.—My impression is, that the injunction ought to go, upon the broad ground which I have already stated. I have not relied on any of the minor circumstances of the case.

Mr. *James, Q. C.*, submitting, an injunction was ordered in the following terms:—

INJUNCTION, restraining the Defendants &c., from accepting a surrender of any shares or share in the company in exchange for tickets of admission, on the terms specified in the advertisement of the 17th of February, 1858, and from admitting any person or persons to the building or grounds on the Lord's day in consideration of any money payment, whether made directly or indirectly.

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IN RE POWELL.

Trustee Act,
1850—13 § 14
Vict. c. 60, s. 7
—*Vesting Or-*
der—Infant
Mortgages—
Married Wo-
man—3 § 4
Will. 4, c. 74.

A mortgagee in fee of real estate having died intestate as to the mortgaged premises, which descended on his death to his infant heir, the Court, upon petition by his executors, one of whom was a married woman, made an order under the Trustee Act, 1850, vesting the legal estate in the petitioners, to such uses as they should appoint, and, in default, to the use of petitioners in fee, subject to the equity of redemption:—in order to enable them to reconvey to the mortgagor without the necessity of having the deed acknowledged by the married woman under the Act 3 & 4 Will. 4, c. 74.

A MORTGAGEE in fee of real estate died intestate as to the legal estate in the mortgaged premises, having, by his will, appointed the petitioners, one of whom was a married woman, his executors and executrix.

The legal estate in the mortgaged premises having descended to his heir-at-law, who was an infant, a petition was now presented under the Trustee Act, 1850, praying that the legal estate in the premises might, by the order of the Court, be vested in the petitioners, their heirs and assigns, to the use of such person or persons, for such estate or estates, and in such manner, as the petitioners or the survivors or survivor of them should by any deed or deeds appoint; and in default of or until appointment, to the use of the petitioners, their heirs and assigns, subject to the equity of redemption subsisting therein.

Mr. *C. Hall* submitted, that, under the 7th section of the Trustee Act, 1850, the Court had power to make an order in the form proposed.

The executrix being a married woman, such an order would enable the petitioners to reconvey the mortgaged premises to the mortgagor without the necessity of having the deed acknowledged by the married woman under the Act 3 & 4 Will. 4, c. 74.

The VICE-CHANCELLOR was of opinion that the 7th section of the Trustee Act enabled the Court to make an order in the form proposed; and the order was made accordingly.

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TUCKER v. KAYESS.

April 30th.

A SPECIAL case.

John Tucker, by his will, in 1853, bequeathed as follows:—"I give and bequeath unto my trustees and executors hereinafter named the sum of 10,000*l.*, to be chargeable and paid as hereinafter mentioned." He then directed them to invest that sum, and to pay the interest to his wife for life, and after her decease to hold the principal in trust for his children as therein mentioned. After which he proceeded as follows:—"I give and bequeath unto my nephew, *James Kayess*, subject to the payment of the said sum of 10,000*l.* within twelve months after my decease, and the payment of my debts, and funeral and testamentary expenses, all my print works at *West Ham*," (&c. describing certain freehold and leasehold property), "to hold to him, his heirs, executors, administrators, and assigns." The testator then devised and bequeathed all his residuary real and personal estate and effects to his wife absolutely; and appointed the Defendants, other than *James Kayess*, trustees and executors of his will.

Will—Construction—Lapse—Devise charged with Legacy—Purpose of Legacy failing—Legacy sinking into devised Estate—Heir-at-Law—Residuary Devisee.

Bequest to executors of a sum of money "to be chargeable and paid as thereafter mentioned," upon trust for testator's wife for life, remainder for his children; then a gift of certain freehold and leasehold property to his nephew, "subject to the payment" of the said sum and to testator's debts; with a residuary devise and bequest to the

The testator never had any child.

The question for the opinion of the Court was, whether

wife absolutely:—*Held*, as between testator's widow and his nephew, that the sum was a charge on the gift to the nephew, and not an exception out of that gift; and testator never having had any child, the sum, subject to the widow's life-interest, belonged to the nephew: the principle being, that, where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burthen, which, in the events that have happened, the testator no longer intended him to bear.

Test in all such cases:—Is the thing in question excepted out of the devised property—in other words, did testator mean to give that property *minus* the thing in question, or is it a charge on that property? If the former, then, the purpose failing, it goes to the residuary devisee; if the latter, to the devisee of the property charged.

Whether a sum of money to be paid out of an estate has ever been held to be an exception—*Quare*.

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the Plaintiff, the testator's widow, was absolutely entitled to the 10,000*l.*, or whether the same, subject to her life interest therein, sank into the estate upon which the same was charged, for the benefit of the devisee thereof.

Argument.
 —

Mr. *Rolt*, Q. C., Mr. *Willcock*, Q. C., and Mr. *Hardy*, for the Plaintiff, the widow, contended, that, according to the true construction of the will, the Plaintiff was absolutely entitled to the 10,000*l.*

That sum was an exception from the property devised to the nephew. It was excepted and separated for all purposes and for all time; it could not, therefore, sink into the devised estate; but the principal sum, subject to her own life interest therein, must go to the Plaintiff as residuary devisee and legatee.

This was not like the case of *In re Cooper's Legacy* (a). Here there was a bequest to the executors in the first instance, and the devise was of "print works"—business premises generally, whether real or personal property—not by any means pure real estate; and to property of that mixed description, the feudal notion of a charge sinking into the land could have no application. The effect of the will was to take, out of the mixed property so devised and bequeathed to the nephew, this sum of 10,000*l.* for all time. And the purposes ulterior to the widow's life interest having failed, she was entitled as residuary devisee and legatee.

The *Solicitor-General* and Mr. *Tripp*, for the Defendant, *James Kayess*, were not heard.

(a) Cor. Vice-Chancellor Wood, 2 March, 1853; *S. C.*, affirmed on appeal before the Lords Justices, 4 D. M. G. 757. The Vice-

Chancellor's judgment is printed in a note to 23 Law J., N. S., Ch., 27.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I really cannot distinguish this case from *In re Cooper's Legacy*, which has been referred to in the argument. Indeed, the expressions in the will now before me are rather stronger against the Plaintiff's contention than those in *Cooper's case*, although even there I was of opinion, and the Court above concurred with me, that the expressions were sufficiently strong to support my decision.

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In the case of *Cooper's Legacy*, the devise was upon trust "to raise by sale or otherwise" the sum in question, and to permit the devisee to enjoy the estate "after raising as aforesaid,"—expressions which did leave room for the contention that the sum was excepted out of the devised estate, and that the testator meant to devise the estate minus the sum in question; and yet, even there, neither this Court, nor the Court above, considered that to be the true construction of the will. But here the words are these,—“I give and bequeath unto my trustees and executors hereinafter named the sum of 10,000*l.*, to be chargeable and paid as hereinafter mentioned;” and after declaring the trusts of that sum, he proceeds thus :—“I give and bequeath unto my nephew, *James Kayess*, subject to the payment of the said sum of 10,000*l.*, and the payment of my debts and funeral and testamentary expenses, all my print works, &c.” In other words, “I charge my print works with 10,000*l.*, and, subject to that charge, I give them to my nephew.” That being so, the case is brought entirely within the authorities referred to *In re Cooper's Legacy*, as establishing, that, where there is a charge by will upon property, and a devise of that property subject to such charge, if the charge fails, it sinks into the devised property for the benefit of the devisee.

The circumstance of this sum being bequeathed to the

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executors, is an incident in the Plaintiff's favour; and, had it been bequeathed to them "as part of the testator's personal estate," it might have been said that the effect of the whole was this:—"I give these print works to my nephew, subject to this circumstance, that I give 2000*l.* out of that property to my personal estate." But, in truth, it comes back to the old distinction between an exception and a charge. The true test being this:—Is the thing in question excepted out of the devised property—did the testator mean to give that property minus the thing in question, or is it a charge upon the devised property. If it is excepted out of the devised property, it goes to the residuary devisee; if it is a charge on the devised property, it sinks into that property for the benefit of the person to whom it is devised; and this case, I must say, is one of the strongest I ever saw of the latter description.

I made the observation *In re Cooper's Legacy*, that "I do not find a single case in the books where a sum of money to be paid out of an estate has ever been held to be an exception;" and I am still of that opinion.

I apprehend that the doctrine, which had its origin in feudal principles, of property lapsing for the benefit of the heir, is inapplicable to cases like this. This case is simply that of a gift subject to a particular charge; and where that is the nature of the gift, whether the subject matter of the gift be real or personal property, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burthen, which, in the events that have happened, the testator no longer intended him to bear.

I must, therefore, declare that the Plaintiff is not entitled to the 10,000*l.*, but that the same, subject to her life-interest, belongs to the testator's nephew under the gift to him in the will.

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THE Plaintiffs were lessees for a term of years, under an indenture dated in March, 1848, of all mines, veins, and seams of coal, in, upon, or under certain closes of land in the city and county of the city of *Bristol*.

These closes of land were situate between two collieries, called *The North Side Colliery*, and *The Malago Vale Colliery*, which, in June, 1852, became vested in the Defendant *Garratt*, by whom, in September, 1852, they were mortgaged in fee to a joint stock banking company, called *Stuckey's Banking Company*. In 1854, *Garratt*

course and level roads made through it underground to connect adjoining collieries in mortgage to Defendants, and large quantities of Plaintiffs' coal were thereby fraudulently gotten and removed without their knowledge—*Held*,

First, That the Defendants, the mortgagees, could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding the proceeds of the coal, so wrongfully removed by him, had found their way week by week, but without notice of the fraud, into Defendants' hands, and notwithstanding they continued the use of the air-course and roads after taking possession, and retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated.

Secondly, That this Court had no jurisdiction to give the Plaintiffs compensation in respect of consequential injury by reason of large portions of their coal being rendered unworkable and useless to them; but *held*,

Thirdly, That Defendants, the mortgagees, could not be allowed to retain the user of the air-course or roads, although the continuance of that user might be no special injury to the Plaintiffs; but,

Fourthly, That, not having themselves made such apertures, they could not be ordered to fill them up.

Fifthly, That, all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not in this Court be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction.

Form of order, under such circumstances, and of decree for an account against the mortgagor and mortgagees, and as to the allowances to be made to Defendants in respect of the coal for which they were held accountable.

If won by Defendants in such a manner as seriously to injure the rest of the Plaintiffs' coal, Defendants would be entitled to no allowance for winning such coal—*Semble*.

Whether, under such circumstances as the above, the onus is not upon persons in the position of the mortgagees to show how much coal had been abstracted by themselves, and how much by others before they took possession—*Quere*.

Distinction, as regards the jurisdiction of this Court, between damages as such, and wrongs attended with profit to the wrongdoer.

March 19th,
20th, 21st, &
22nd.

Mortgagor and
Mortgagee—
Mines—Tres-
pass—Ab-
stracting Coal
—Consequential
Injury—Da-
mages—
Wrongs attend-
ed with Profit—
Injunction—
Account—Onus
of Proof.

Where a tres-
pass was com-
mitted on
Plaintiffs' mine,
and an air-

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became embarrassed in his affairs; and on the 29th of May, 1854, the bank took possession of the property comprised in their mortgage.

Shortly before the bill was filed, the Plaintiffs discovered that a large air-course and certain level roads had been made underground through their mines, to connect the two collieries mentioned above; and that large quantities of the Plaintiffs' coal had thereby been fraudulently gotten and removed without their knowledge.

The precise date when these tortious acts were committed did not appear; but it was in evidence that the chief agent in their perpetration was the Defendant *Stewart*, who was employed by *Garratt* as his agent and manager, to superintend the collieries while he continued in possession, and who was retained by the banking company in that capacity after they took possession of the mortgaged property.

It was in evidence that *Garratt* had an account at the bank; and it appeared by the bank books that, week by week, the moneys received by him, including the proceeds of the coal improperly abstracted from the Plaintiffs' mines, were paid into the bank to the credit of his account, and were applied by the banking company (but without notice of the fraud) in reduction of his debt to them.

It appeared that the Defendants, the banking company, on taking possession of the mortgaged property, not only retained *Stewart* as manager of the collieries, but continued to use the air-course and level roads through the Defendants' mine, and landed and raised coals by those means from the adjoining collieries.

The bill charged, and there was evidence in support of

the charge, that, in consequence of the trespasses of the Defendants, the Plaintiffs would be obliged to leave additional barriers against their own works, and the coal required for such barriers was thereby lost to the Plaintiffs; that the Plaintiffs' workings were injured by the interruptions in their levels, and in obtaining access to their works, and were excluded altogether from about 16,000 square yards, (equal to as many tons) of this coal, which were severed by the Defendants' trespasses, and could not ever be worked.

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The bill prayed an account of all coal gotten by the Defendants under any of the lands mentioned in the Plaintiffs' lease, and of all moneys received by the Defendants by the sale of such coal; that the Defendants might be decreed to pay the amount of such moneys, and compensation for the aforesaid severance of part of the Plaintiffs' mines, and the loss of profit on the mines so severed, and for the coal required for the barriers rendered necessary by the aforesaid trespasses, and for all other injury; and that the Defendants might also be charged with a way-leave-rent or royalty, in respect of their use of the air-course and roads in the Plaintiffs' collieries, and the landing and raising of coals from the adjoining mines by means thereof.

In the second paragraph of the prayer the Plaintiffs asked for an injunction to restrain the Defendants from digging coals, and from carrying on any workings under the lands comprised in the Plaintiffs' lease.

The bill also prayed that the Defendants might be ordered to stop up and close the air-course, and to stop up and remove the roads made in the Plaintiffs' mines.

Mr. Rolt, Q. C., and Mr. W. D. Lewis, for the Plaintiffs, contended that the banking company were answerable in

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respect of all coals gotten or removed from under the lands comprised in the Plaintiffs' lease, by means of workings carried on from the Defendants' collieries, whether the same were gotten or removed before or after the bank took possession of the mortgaged property.

The bank were mortgagees. *Garratt*, by whom the Plaintiffs' coal was originally abstracted, was at that time their mortgagor, and stood towards them merely in the position of tenant at will; and whatever trespass was committed by him upon the adjoining lands of the Plaintiffs, whatever property of the Plaintiffs was wrongfully abstracted by him in the course of such trespass, the circumstance of his having been allowed by the bank to continue in possession of the mortgaged property, made the bank responsible for his misconduct; as at law, the owner of land may proceed for mesne profits by an action in the nature of an action of trespass against a person not actually in possession: *Doe v. Harlow*(a). Having allowed *Garratt* to continue in possession, the bank constituted him their agent, and were answerable for the damages resulting from his misconduct in the course of such agency.

Besides, it appeared by the books of the bank that all moneys received by *Garratt* since the trespass was first committed, including the proceeds of coal improperly abstracted from the Plaintiffs' mine, were paid week by week into the bank to the credit of his account, and were applied by the bank in reduction of his debt to them.

If these grounds, taken alone, would not be sufficient, the mortgagees having, after they took possession, continued the wrongful acts which their mortgagor originally committed, having availed themselves of the air-course and level roads, by means of which the wrongful abstraction was carried on by their mortgagor, having continued to em-

(a) 12 Ad. & Ell. 40.

ploy the manager who all along had been the chief instrument and agent of the fraud, and having continued the wrongful workings through his agency,—those circumstances, taken in connexion with the former, gave the Plaintiffs a right to relief against them, and enabled the Court to hold them accountable for acts committed, not by themselves, but by their mortgagor.

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But if the bank were not accountable in respect of coals gotten or removed in the manner described before they took possession of the mortgaged property, they were at least accountable for all coal so gotten or removed after that date. And, in any case, the Plaintiffs were entitled to the injunction prayed by their bill.

The Plaintiffs were also entitled to compensation for way-leave, and the damage sustained by the Plaintiffs by reason of their coal being made unmarketable, and in particular by reason of the removal by the Defendants of the barriers which ought to have been left against the Plaintiffs' works, the loss of which would oblige the Plaintiffs to have additional barriers, the coal for which would consequently be lost to them.

As regarded the Defendant *Stewart*, he, as the principal instrument and agent of the fraud throughout the transaction, was responsible, not only in costs, but also for the value of the coal removed.

They cited *Jesus College v. Bloom*(a), and *Dean v. Thwaite*(b).

VICE-CHANCELLOR SIR W. PAGE WOOD :—

As regards many of the points that have been argued, I shall not call upon the Defendants' counsel.

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(a) 3 Atk. 262.

(b) 21 Beav. 621.

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Certain trespasses of very serious magnitude, and highly discreditable to those who engaged in them, were committed upon the property of the Plaintiffs at a date not now apparent; but, for the purposes of the argument, I will assume that some were committed anterior to the 29th of May, 1854, when possession was taken of the mortgaged property by the Defendants, the mortgagees.

Assuming that to be so, it is first contended on behalf of the Plaintiffs, that the mortgagees are liable for all the trespasses which were committed by their mortgagor.

It is argued, that a mortgagor is a mere tenant at will to the mortgagee, that the latter may treat him as he thinks fit; and therefore, whatever trespass is committed by the mortgagor upon the adjoining lands—whatever property belonging to his neighbours may be abstracted by him by means of such trespass—the mere circumstance of his having been allowed by the mortgagee to continue in possession of the mortgaged property is to have the effect of making the mortgagee responsible for his misconduct.

That would be a most serious doctrine for the large portion of the community who hold mortgages in this country. The decision in *Lucas v. Comerford*(a) was found sufficiently dangerous from the extent to which it was afterwards carried; and even that was overruled in *Moore v. Greg*(b). But that every mortgagee is to be answerable for the trespasses committed by his mortgagor, is a proposition for which it would be difficult to find a rational ground.

It was said, there is some ground for it in this respect, that, at law, you may proceed for mesne profits by an action in the nature of an action of trespass against a person not actually in possession. The only authority cited

(a) 3 Bro. C. C. 166; *S. C.*, 1 Ves. jun. 235. (b) 2 Phill. 717.

for that was *Doe v. Harlow*(a); but there the question was not whether you could proceed against a person not in possession, but whether the Defendant was not to be deemed to be in possession, inasmuch as he admitted that he had made an underlease to another against whom mesne profits were also claimed, and was actually in possession of the profits of the land through the medium of that underlease. The Court held that he was. No proposition could be more reasonable: and it is satisfactory to find that a Court of law was able so to decide, and to hold that those who enjoy the benefit of property are accountable for the profits.

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But the proposition upon which I am asked to act is this, that, the mortgagor being allowed to continue in possession of this property by his mortgagee, there exists between them a constructive agency, so that the mortgagee is to be deemed to have constituted the mortgagor his agent for the purpose of committing the tort or trespass; and, therefore, the mortgagee should be made to answer for the damages which have ensued.

It is said, that, if that is not sufficient, there is another ground in this case for making the mortgagees responsible for profits accruing before they took possession. It is said, that it appears, by the books of the bank, that the moneys received by the Defendant *Garratt*, including the proceeds of the coal improperly abstracted by him from the Plaintiffs' mine, have found their way, week by week, into the pockets of the bankers, the mortgagees. If the Plaintiffs brought home to the bankers a knowledge that any of the coal from which these moneys arose was, in fact, the property of the Plaintiffs, so as to make them parties to the improper abstraction, that would make them accountable, but upon a principle totally different from that upon which this case has been put. To say, that, because a person who

(a) 12 Ad. & Ell. 40.

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owes me money, pays into my bank, or makes a payment to me personally, out of property which he has improperly abstracted from another,—he being justly and truly indebted to me,—the party he has injured can, on that ground, come upon me for the money so paid, would be to assert a proposition wholly unjustified by authority.

But it is argued, that, if the Plaintiffs cannot avail themselves of the two grounds I have referred to, taken separately, the mortgagees having continued, as it is alleged, after they took possession, that wrongful act which their mortgagor originally committed, and having availed themselves of the galleries and other operations by means of which this wrongful abstraction was carried on, that circumstance, taken in connexion with the former, gives the Plaintiffs a right to relief against them, and enables the Court to attribute to them, and to hold them accountable for, acts committed, not by themselves, but by their mortgagor.

This argument comes round to the same question: were the mortgagees privy to the acts in question? If they were, the account would be against them as much as against their mortgagor. But to say, that, because coals were improperly abstracted, through the medium of roads or air-passages giving an entrance into the mine, and the mortgagees afterwards availed themselves of that entrance into the mine, they are answerable for coals which they did not abstract, is an assertion for which I cannot find any ground.

Another part of the case, as to which I need not call upon the Defendants, is that in which compensation is claimed for way-leave, as it is called, and for the damage sustained by the Plaintiffs by reason of his coals being made unworkable by the acts of the Defendants. The

latter charge refers principally to the question as to the alleged removal, by the Defendants, of the barriers which ought to have been left against the Plaintiffs' works, the loss of which, it is said, will oblige the Plaintiffs to leave additional barriers, the coal for which will be lost to the Plaintiffs. That is good ground for an account and payment in respect of the coal improperly removed, but is not a ground for compensation in respect of ulterior damages occasioned by such removal. If the barriers have been removed, the coal of which they consisted must be paid for; but, undoubtedly, the removal does not constitute a case for consequential damages.

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With reference to the subject of consequential damages, I cannot find that the Court has attempted to exercise jurisdiction of that kind; and I apprehend the reason to be, that, while the Court has adequate means, by taking an account of profit realised either by waste or by the working of coal, to give relief in respect of wrongs attended with profit to the wrongdoer, it has no adequate means of ascertaining the amount of damage sustained by reason of merely tortious acts, unattended with profit; for which reason such questions have always been considered by the Legislature as the province of a jury.

I have been looking at some authorities on this subject, and I referred during the argument to a class of cases with which this Court has constantly to deal, namely, cases of copyright, where there is a great deal of damage which the Court never compensates, or attempts to compensate. In *Colburn v. Simms*(a), Vice-Chancellor *Wigram*, considering the question of copyright, says, "The Plaintiff has succeeded in the most material part of his case by making the injunction perpetual. The supposition, that, at the hearing of the cause, the Court could give the Plaintiff something

(a) 2 Hare, 543.

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beyond the account was, however, erroneous." What was asked in that case beyond the account was the delivery up to be cancelled of certain copies of the piratical work. "It is true," he continues, "that the Court does not by an account accurately measure the damage sustained by the proprietor of an extensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged" (a).

That is one of the latest cases on the subject. One of the earliest is that of *The Bishop of Winchester v. Knight* (b). It is only a dictum, for the decision was, that the Plaintiff was not entitled. But it was argued, that, as to the ore dug in the ancestor's lifetime there was no colour to ask relief, because, being a personal tort, it died with the person; and that with respect to the ore dug in the heir's own time, there could be no remedy, for that the customary tenants were as freeholders. The Lord Chancellor says, "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime and dies, that in this case I must be without remedy. It is true, as to the trespass of breaking up meadow or ancient pasture ground, it dies with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it." There the distinction is broadly drawn between damages as such, and wrongs attended with profit to the wrongdoer—a distinction since

(a) 2 Hare, 560.

(b) 1 P. Wms. 406.

discussed in several cases—one of the latest being that of *Parrott v. Palmer* (a)—all leading to the conclusion, that, except in cases of wrong attended with profit to the wrong-doer, there can be no relief in suits of this description. In suits for specific performance, where damages have been sustained pending the suit, and the question has arisen, how much of the purchase-money should be rebated, the Court has taken upon itself to fix the amount; but I know of no case that goes to the extent which is contended for here: and in this case I cannot do more than charge each party, mortgagor and mortgagees, respectively, with what they have worked.

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There remains a question as to the form of the decree; for, before *Dean v. Thwaite* was cited, it had occurred to me to consider, whether, under the peculiar circumstances of this case, the onus is not thrown upon the bank to show that they did not work the coal which appears to have been worked,—in other words, to show when that coal was worked, and so to discharge themselves. Upon that part of the case I must hear a defence, and also upon the question as to the injunction, and what should be done with the air-course and roads, and whether the bank should not pay the costs up to the hearing.

Mr. Willcock, Q. C., Mr. Amphlett, Q. C., and Mr. Stuart, for the banking company, contended, that they ought not to be restrained from the use of the air-course, still less should they be ordered, as prayed by the bill, to close an aperture and stop up roads which they did not make, and for the making of which the Court had held them not to be answerable. The aperture had been made to air the mine; and, whether rightly or wrongly so made in the first instance, being made, its continuance was no injury

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resumed.

(a) 3 M. & K. 632.

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—
*Argument
resumed.*

to the Plaintiffs. The Plaintiffs' rights were restricted to the veins and seams of coal, which alone were demised by their lease; they could not, by the removal of any portion of that coal, acquire a right to the vacuum left after that portion had been removed. And even if they could, the Court would deal with the case by way of compensation and not by injunction, and would set a value upon the easement of which the Defendants, by no fault of theirs, were deriving the benefit, and which occasioned no inconvenience to the Plaintiffs. At any rate, the Court would not throw upon the banking company the expense of filling up apertures which they did not make.

With regard to the account, the Court would not throw upon the bank the onus of proving, by negative evidence, that they did not work the coal in question.

The VICE-CHANCELLOR.—At a certain date, after you take possession, your agent is found working at a particular spot in the Plaintiffs' mine, and concealing that from the Plaintiffs:—is it for you, or for them, to show how much of the coal which is proved to have been abstracted, was abstracted by you, and how much by others before you took possession?

Mr. Willcock.—That question can be determined when it arises.

Then, as to allowance for working, assuming the Court to decree an account against the Defendants, they will be entitled to allowance in respect of their charges and expenses on account of the coal for which they may be held accountable, from the time when such coal was severed and first existed as a chattel, including carriage to the pit's mouth: *Martin v. Porter*(a), *Wild v. Holt*(b), *Morgan v. Powell*(c).

(a) 5 M. & W. 351.

(b) 9 Id. 672.

(c) 3 Q. B. 284.

Mr. C. Hall, for the assignees in bankruptcy of *Garratt*;
Mr. G. L. Russell, for the Defendant *Stewart*.

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Argument
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The VICE-CHANCELLOR (to Mr. Lewis).—You are entitled to an injunction as regards the air-course and level roads; but the persons now in possession not being the persons who made those apertures, I doubt whether I have power to make them close them.

Mr. Lewis replied on this point, and also on the question of the allowance to be made in taking the account, contending that no allowance should be made to Defendants for getting coals, when the digging for these very coals had caused the Plaintiffs that injury for which the Court was powerless to grant them compensation.

The following cases were also cited:—*Traherne v. Gardner* (a), *Lee v. Alston* (b).

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have now taken time to frame the minutes so as to meet the justice of the case.

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resumed.

I have already determined, and will not repeat the reasons for my determination, that the Defendants, the banking company, should not be made answerable in respect of their appropriation of so much of this property as was acquired by the improper working of *Garratt* prior to their taking possession, either by reason of their subsequent taking possession and continued workings of that description through the agency of *Stewart*, or by reason of *Garratt* happening to bank with them, and to pay his ill-got-

(a) 26 Law J., N. S., Q. B., 259.

(b) 3 Bro. C. C. 37.

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ten gains into their hands as his bankers. But I thought they were answerable in respect of any portion of that property worked by them since they took possession, namely, since the 29th of May, 1854. And the question that occurred to me was, as to what I ought to do in the event of its being impossible to ascertain what portion had been worked before, and what portion had been worked after that date. This question, however, does not yet arise; and I shall, therefore, leave it open, directing such an inquiry as will bring all the facts capable of being ascertained before the Court.

The question as to the injunction I also determined in favour of the Plaintiffs, without hearing a reply. It was said, that the workings in question in the Plaintiffs' property were made for the purpose of an air-course; but, looking to the very unscrupulous proceedings of the parties, although that may have been the original motive, I am not satisfied that it was the sole motive for making this aperture—an aperture so large that they appear to have found it necessary afterwards to reduce it. But, however that may have been, it did not follow, because persons found it necessary to air their mine, that they were to be at liberty to make a hole through the Plaintiffs' property without giving them the least intimation of their intention, or any opportunity of bargaining for the privilege they required. Rights of this description are valuable privileges, which the owners do not concede without a pecuniary consideration.

It was argued, that, as the act was done, the Court would now set a value upon the privilege thus usurped. But that is not the province of the Court. It is the province of the owner. The mine is his property, on which he has a perfect right to set his own value, and he is not to have it interfered with without making his own bargain. The Court cannot make a bargain for him. He must make it for himself, and the only question is, whether, the banking

company having taken possession after the act was done, an injunction can be granted against them to restrain its continuance. I feel I should not be doing justice between the parties unless I prevented a continuing wrong of this description, although committed by persons whom the bank succeeded in title. The bank, when they so succeeded in title, found the property in this condition, and with the wrong effected in the manner I have described. The Court is at liberty to say, you shall have no longer the user of what has been thus wrongfully acquired. The Plaintiffs having now discovered that wrong, which they could not discover earlier, it being an underground operation, and carried on, like all such operations, clandestinely, and by which they have been robbed of an enormous quantity of coal, have a right to say it shall not be continued, and to be put in the position they were in before. Therefore, I am entitled to order that access to the air-course be given to the Plaintiffs to enable them to block it up.

I think it better to make the order in that form. I feel some difficulty in throwing upon the banking company the expense of filling up an aperture which they did not make; but I hold they are not entitled to retain the user of an aperture made behind the Plaintiffs' backs, and under the circumstances I have described. Whether the continuance of that user is any special injury to the Plaintiffs, whether it is any special injury to the Plaintiffs to have this air-course existing through their ground, is a question the Court will not stop to inquire into. It is an injury to them to have a valuable right over their property—a right for which they might have claimed a pecuniary consideration in proportion to its value—usurped by a fraud of this description; and it will be a further injury to them if they are not at liberty, when that fraud is discovered, to apply to the Court to have it remedied, and to be replaced in the position they were in before.

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resumed.*

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resumed.

I have not forgotten the suggestion, that, the Plaintiffs' rights being only to the veins and seams of coal demised by their lease, they cannot, by the removal of any portion of that coal (which is all that was demised to them), acquire a right to the metaphysical entity, the vacuum left after that portion has been removed. But it does not, therefore, follow that the Defendants have acquired a right by this wrong, which they are entitled to continue.

With regard to *Stewart*, it was argued in reply that he is personally chargeable for the value of the coal removed. He has been very active and vigorous in the wrong done to the Plaintiffs; he is, therefore, a very proper person to be made a party to the suit in respect of the inquiry that is sought, and is very properly chargeable with the costs of the litigation. But, as to what is further asked, it appears to me, that the case against him is one simply of trespass and tort. He is not charged with the receipt of trust money. He is charged simply with trespass and tort; and in such a case, you cannot, in this Court, charge a person who is not shown to have received any portion of the profits arising from the fraudulent transaction. Here, so far from that being shown, it is in evidence that the whole of the proceeds were paid directly into the bank to the credit of *Garratt*, and that *Stewart* took no part of them. As to his paying the costs of the suit I had no question, even before the reply.

With regard to the general costs of the suit, it appears to me that the banking company are also liable to the payment of those costs.

In the inquiry I am about to direct, as to what coals were gotten *and* removed before the 29th of May, 1854, when the banking company took possession, and what coals were gotten *or* removed since that date, I use the word "or" purposely, because, although gotten before they took posses-

sion, if removed by them afterwards they are chargeable for such coals.

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resumed.

I have had some difficulty as to the allowance to be made to the parties chargeable in respect of their charges and expenses on account of the coal so gotten or removed, because, while on the one hand I cannot give the Plaintiffs compensation as damages for the injury the Defendants' digging may have incidentally occasioned to their property, it may be a question whether any allowance should be made to the Defendants for getting coals, where the digging for those very coals may have occasioned such injury. That difficulty, however, will be met by directing all just allowances to be made to the parties chargeable in respect of such charges and expenses. Some allowance, it is clear, they would have under ordinary circumstances, according to all the authorities; but it may be, that the coal has been won in such a manner as seriously to injure the rest of the Plaintiffs' coal. In such a case there would be no just allowance to be made.

DECLARE Defendant *Garratt* to be answerable in manner hereinafter mentioned in respect of all coals gotten or removed from under the closes or lands mentioned in the lease of March, 1848, by means of workings carried on from the *North Side Colliery* and *Malago Vale Colliery*, or either of them, prior to the 29th of May, 1854. And declare *Stuckey's Banking Company*, and the Defendants *Aiken* and *Coles*, as public officers of the same, to be chargeable in manner hereinafter mentioned, in respect of all coal gotten or removed from under the closes and lands in the said lease mentioned, by means of workings carried on from the said collieries, or either of them, since the 29th of May, 1854. Inquire what coals were so gotten and removed before the 29th of May, 1854; and what coals were so gotten or removed since that date. And inquire whether any and what quantity of coal has been gotten or removed from under the said closes, the precise time of getting or removing which cannot be ascertained. Certify the market price or value, or as near thereto as may be, of all

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Decree.*

coal so gotten or removed as aforesaid at the pit's mouth, all just allowances being made to the parties chargeable in respect of their charges and expenses on account of such coal. The aforesaid declarations and inquiries to be without prejudice to any question whether *Garratt*, and *Aiken* and *Coles*, or either of them, are subject to be charged in respect of the coal, if any, which may have been gotten or removed, but the precise time of getting or removing which cannot be ascertained. Injunction according to the second paragraph of the prayer, and also injunction against the Defendants continuing to use the air-course in the bill mentioned, or any of the level roads under the closes mentioned in the lease. The Defendants *Aiken* and *Coles*, and *Stuckey's Banking Company*, to give and allow to the Plaintiffs, their servants, workmen, &c., access through their pits and the air-courses and roads in their collieries, in order that the Plaintiffs may stop and close the air-courses in the bill mentioned, and stop up or remove the roads in the Plaintiffs' mines; and access also for carrying down the materials which Plaintiffs may deem necessary for the purpose of such stopping up. Tax Plaintiffs' costs up to the hearing [with certain exceptions not material to the report], such taxed costs to be paid to Plaintiffs by *Garratt* and *Stewart*, and by *Aiken* and *Coles* as public officers of *Stuckey's Banking Company*. Reserve the consideration of the costs of all parties not hereby disposed of. Stay proceedings against *Stewart* on his payment of costs as ordered. Reserve further consideration.

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JONES v. JONES.

June 1st.

THIS suit was instituted for the administration of the estate of *William Jones*, deceased, who died intestate in 1852, leaving a widow whom he had married in 1847, and leaving an only son his heir-at-law.

*Dower—
Widow—Heir
—3 & 4 Will.
4, c. 105—Ad-
ministration of
Assets.*

His simple contract debts amounted to 282*l.* 16*s.* 8*d.*; his specialty debts consisted of a sum of 4106*l.* 17*s.* 5*d.*, due in respect of principal and interest secured by a mortgage of all his freehold and leasehold property, executed by himself in 1849, and an annuity for 100*l.* a-year on the life of a person, aged at his decease fifty-two years. His personal estate amounted to 757*l.*

Under the late Dower Act (3 & 4 Will. 4, c. 105) a widow has no right, as against the heir-at-law of her deceased husband, to be indemnified in respect of a mortgage created by the deceased.

The freehold and leasehold estates comprised in the mortgage were sold by order of the Court, and produced in all 8450*l.*, of which sum 2407*l.* was the ascertained value of the leasehold portion, leaving 6043*l.* as that of the freehold. Out of this sum of 8450*l.* the mortgage debt was paid, and the residue (4796*l.* 12*s.* 9*d.*) was paid into Court to the credit of the cause.

Therefore, where, in a case of that description, the mortgaged property had been sold by order of the Court in a suit for administration of an intestate's estate:—*Held*, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage.

By his certificate under the order on further directions, the Chief Clerk found—

1. That the widow was entitled to dower out of the freehold estates of the deceased, subject to the mortgage on the said freehold estates.

2. That the value of his leasehold estates (2407*l.*) was insufficient for the payment of his debts.

3. That the dower to which the widow was entitled amounted to the sum of 27*l.* 5*s.* a-year during her life, the value of which, at the time of the death of the intestate, was

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451*l.*, assuming that there was not any personal estate to pay any part of the mortgage debt (*a*).

A summons was obtained on behalf of the widow to vary the first paragraph of this certificate, by omitting the words "subject to the mortgage on the said freehold estates;" and to have it declared, that, as between the widow and the heir-at-law of the intestate, the widow was entitled to dower out of the whole of the freehold estates of the intestate; that the freehold estates of the intestate, which descended on his heir-at-law, were to be applied primarily in payment of the debts of the intestate not satisfied out of his personal estate; and that the third paragraph of the certificate might be varied by declaring that the freehold estates of the intestate, which descended on his heir-at-law, were more than sufficient to pay his debts left unsatisfied by his personal estate; and that the dower to which the widow was entitled amounted to 80*l.* a-year during her life, the value whereof, at the decease of the intestate, was 1300*l.*; or that the certificate might be varied by declaring that the widow was entitled to such further or other sum over and above the 27*l.* 5*s.* during her life, as the Court should think proper.

Argument.

Mr. *Daniel*, Q. C., and Mr. *Rendall*, for the widow:—

As against the heir-at-law, the widow is entitled to dower out of the whole of the freehold lands of the deceased, before any provision is made for payment of the mortgage debt—that is, in this case, out of the gross sum of 6043*l.*; and not merely, as the Chief Clerk has certified, out of the clear surplus of that sum, after payment of what is due upon the mortgage.

(*a*) This last clause was added after the summons was obtained.

Under the old law, the case would have been clear. The widow, as purchaser, would have been entitled to precedence, even over a legatee, *Burridge v. Bradyl*(a), and à fortiori over the heir: Co. Litt. 208. a. And the late Dower Act(b) has not altered the law in this respect. Notwithstanding the 5th section(c) of the Act, upon which alone any question can be raised, it has been held by the Master of the Rolls that the widow's right to dower has priority over creditors: *Spire v. Hyatt*(d).

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The VICE-CHANCELLOR.—Over mere creditors, having debts, to which “the land of the deceased” is *not* “subject or liable.” But this is a mortgage debt, a charge upon the land. All that the Master of the Rolls there decided was, that, where there is no charge of debts in the lifetime of the deceased, the widow's right to dower has priority.

Mr. *Rendall*.—But the principle of his Honour's decision goes further, and extends to all debts. He says: “In truth, what is claimed by or comes to the widow was no part of what the intestate was seised of at his death. He died seised of lands subject to the widow's right to dower, and it is only that which became subject to the payment of his debts.”

The VICE-CHANCELLOR.—Suppose the mortgagee had sold, would the widow have had any equity of this kind against the heir?

Mr. *Daniel*.—A sale in the lifetime of the deceased

(a) 1 P. Wms. 126.

(b) 3 & 4 Will. 4, c. 105.

(c) The 5th section provides—
“That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incum-

brances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.”

(d) 20 Beav. 621.

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would have been an "absolute disposition" of the property within the 4th section of the Act (a).

The VICE-CHANCELLOR.—And is not this such a disposition *pro tanto*?

Mr. *Daniel*.—We submit it is not. This case cannot fall within the 4th section. The widow would have been entitled to redeem.

The VICE-CHANCELLOR.—Suppose she had redeemed, she would have gained nothing by it against the heir. What she asks is, to get from the heir something, which, during her husband's life, was alienated by him, *pro tanto*, to the extent of the mortgage debt. What was it, according to your contention, that descended to the heir?

Mr. *Rendall*.—So much of the real estate of the deceased as was not required to answer the debts of the deceased, and estates and charges in favour of others, of which the widow's dower was one. The dower of a widow is an estate in the land, until her husband exercises his statutory power of depriving her of it. There is a clear implication upon the Act, that, until that power is exercised, her right shall not be prejudiced.

[He read, as part of his argument, an article on this subject in the *Jurist* (b), and cited *Tipping v. Tipping* (c) and *Tynt v. Tynt* (d), to show, that, although under the old law the question could not arise, the husband having no power

(a) The 4th section enacts—
 "that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will."

(b) 1 Jur., N. S., part 2, pp. 338, 339.

(c) 1 P. Wms., 729.

(d) 2 Id. 541.

over his wife's dower; yet, in the analogous case as to paraphernalia the principle for which he contended was recognised, the right of the widow being preferred.

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Argument.

Mr. *James*, Q. C., and Mr. *Whitbread*, proceeded to contend that the right of the widow was limited to one-third of the income of the clear surplus proceeds after providing for the mortgage debt, which, by the 5th section of the Dower Act, was made valid and effectual against her right to dower.

It was argued, that she had a right to have the estate cleared of her husband's debts; but the 5th section deprived her of that right in the case of all debts charged by her husband on his real estate. Such a charge was, in fact, a partial alienation; and the argument must go to this extent, that if the deceased had granted an annuity, or a life-estate, out of his lands—

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I think I ought not to hear any more, the point being clear without argument. *Judgment.*

This Act was intended, from the beginning to the end, for the benefit of the husband, by giving him powers of alienating his lands without the consent of his wife, which powers, until the Act came into operation, he did not possess. Considerable benefits are given also to the wife, who is to be entitled to dower out of equitable estates, and others, to which she had no claim independently of the Act; but the main scope and object of the Act are the rights which it gives to the husband.

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These rights are conferred by the 4th and 5th sections. By the 4th section he is to have an absolute, by the 5th section a partial power of alienation or disposition over his lands; and, in either case, such alienation or disposition by him, whether absolute or partial, is to be valid and effectual as against his widow.

It is said, true, he may make a partial alienation by a mortgage or charge of this description, and as against the widow the charge will be valid and effectual; but an equity will arise in that case between the widow and the heir, and as against the heir the widow has a right to come into this Court and to call upon him to make good to her what her husband has deprived her of by means of this charge. But the answer is, that all partial estates and interests, just as much as absolute estates and interests, are to be valid and effectual against the widow—not, indeed, mere debts, but debts to which her husband's lands are subject or liable. Such debts are, in effect, partial interests in those lands; and this lady might as well seek to oust a life estate created by her husband, and to obtain against the heir indemnity in respect of a partial interest of that description, as to sustain the equity for which she now contends.

It appears to me that she has no such equity as against the heir; and I cannot concur with the observations of the learned writer which were made part of the argument on her behalf.

As regards the case of *Spire v. Hyatt* (a) which was cited in argument, with the decision and with the first part of the observations of the Master of the Rolls in that case I quite concur. Mere debts, to which the lands of a deceased husband are not subject or liable, are not within the

(a) 20 Beav. 621.

5th section of the Act, and are not by that section made valid or effectual as against his widow's right to dower. But that is an entirely different proposition from the one here contended for.

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—
Judgment.

I must, therefore, order the Chief Clerk's certificate to be confirmed.

COPE v. DOHERTY.

IT appeared by the bill that the Plaintiffs were *Americans*, and owners of the *American* ship *Tuscarora*.

V. C. WOOD,
May 1st &
3rd.
LORDS JUSTICES,
June 12th.

The bill stated, that, in April, 1857, a collision took place between *The Tuscarora* and another *American* ship, *The Andrew Foster*; shortly after which, the latter foundered and was lost, with her cargo.

International Law—Municipal Law—Acts of Parliament—Principle of Construction.

The bill stated, that, in respect of the loss of *The Andrew Foster*, the Plaintiffs were answerable in damages to the extent and in manner mentioned in Part IX. of the Merchant Shipping Act, 1854 (a), that is to say, to the extent

Prima facie, and unless the contrary be expressed, or be implied from the absolute necessity of the case, every Legislature must be

presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights.

Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104)—Collision between Foreign Ships—Foreign Law—Judicial Cognizance.

The limitation of liability provided for a shipowner by the 504th section of the Merchant Shipping Act, 1854, where loss or damage is occasioned by his ship to any other ship, or to the goods on board any other ship,—*Held*, not to apply to a case of collision between two *American* ships upon the high seas.

And the Court refused to take judicial cognizance that the law of *America* is, in this respect, the same as our own.

But if that circumstance be averred and proved, the Court can administer *American* law between *Americans*—*Semble*.

(a) 17 & 18 Vict. c. 104.

B B 2

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of the value of *The Tuscarora* and the freight due or to grow due in respect of her then voyage; but such value was insufficient to answer all the claims made, or which might be made, against the Plaintiffs in respect of the loss of *The Andrew Foster*.

The bill further stated, that certain of the Defendants, as owners or consignees of cargo on board *The Andrew Foster*, had obtained judgment in the Court of Admiralty, affirmed on appeal by the Judicial Committee of the Privy Council, whereby the Plaintiffs were condemned in the damages consequent on the collision, and in costs; and that *The Tuscarora* had been arrested by process of the Admiralty Court, and was still under arrest and liable to be sold. It also stated, that similar actions had been commenced in respect of the collision by the rest of the Defendants, some claiming as owners of cargo on board *The Andrew Foster*, others as part owners of that ship.

The bill prayed,—(1), That the value of *The Tuscarora* and the freight due and to grow due in respect of the voyage, at the time of the collision, might be ascertained as the Court should direct, the Plaintiffs being willing to pay into court such sum as, upon the result of such inquiry, should properly be payable by them; (2), That the sum so paid into court might be distributed rateably among the several claimants who had made, or should, within such reasonable time as the Court should direct, make or establish any claim in respect of the loss of *The Andrew Foster*; (3), That the claims of all parties who should not come in and establish their claims within such reasonable time might be excluded; and (4), That the Defendants might be restrained from further proceeding in the Admiralty Court, and from prosecuting the actions commenced by them, and from taking any other proceedings in relation to the subject matter, and from selling the ship; or, if not wholly re-

strained as aforesaid, might be so except so far as in the opinion of the Court they ought not to be restrained.

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Several of the Defendants demurred for want of equity.

It appeared that some of the Defendants who demurred were *British* subjects; but it did not appear whether all were so.

Mr. James, Q. C., and Mr. Giffard, in support of the demurrer—

Argument.

Contended, that, the Plaintiffs being foreigners, and the collision having taken place upon the high seas(a) out of the jurisdiction of this country, the case must be governed, not, as the bill presumed, by the municipal law of the United Kingdom, but by the general rule of international law in cases of collision, namely, that the owner of a vessel doing damage to another is answerable for the total loss occasioned by the negligence or unskilfulness of the persons he employs, and is liable to make full compensation—Per Lord Stowell, in the case of *The Carl Johann*, cited in the case of *The Dundee*(b); and per Sir John Nicholl, in the case of *The Girolamo*(c) citing Lord Stowell in *The Nostra Signora de los Dolores*(d).

The limitation of liability provided in such cases by the Merchant Shipping Act, 1854(e), was our own municipal law, intended for our own subjects, and did not extend to foreigners. The Act was a consolidation of all the earlier statutes relating to merchant shipping; and that part of it was incorporated from an earlier Act, devoted almost ex-

(a) This was not averred in the bill.

(b) 1 Hagg. A. R. 113.

(c) 3 Hagg. A. R. 186.

(d) 1 Dods. 290.

(e) 17 & 18 Vict. c. 104, Part IX. s. 504.

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clusively to the limitation of liabilities of shipowners; the 53 Geo. 3, c. 159, which had been expressly held by Lord Stowell, in the case of *The Carl Johann*, cited in the case of *The Dundee* (a), not to extend to foreign ships, upon the ground that it was a measure of policy, passed for the encouragement of our own maritime interest, and to remove the terrors which would otherwise discourage people from embarking in our maritime commerce. That decision must be applicable to the present Act, incorporating as it did these very same provisions from the earlier Act, otherwise the process of consolidation would result in a general unsettling of the statute law as declared by judicial interpretation. And even if the decision were not so applicable, the principle must be so. The effect of both Acts was to relax the general rule of international law; and *prima facie* all such Acts are limited to the subjects of the country for which they are passed, and do not extend to foreigners. "It is never to be presumed, unless the words are so clear that there can by no possibility be a mistake, that the British Legislature exceeded that power which properly belongs to it," viz. "to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further."—Per Dr. Lushington, in the case of *The Zollverein* (b); and here no provision can be pointed out to rebut that presumption. Upon this principle, Lord Stowell, in the case of *The Nostra Signora de los Dolores* (c), decided that foreigners when suing British subjects were not bound by the municipal law, and said, "I do not recognise the applicability of those cases which have been determined between British subjects to such a case as this, which is founded on the law of nations, is brought on the complaint of a person not subject to our laws, and is to be tried in a Court whose duty it is to administer the law of nations" (d). And Dr. Lushington, in the case of *The*

(a) 1 Hagg. A. R. 113.

(b) 2 Jur., N. S., 429.

(c) 1 Dods. 290.

(d) And see Sir John Nicholl, in the case of *The Girolamo*, 3 Hagg. A. R. 186.

Zollverein, held that the 296th, 298th, and 299th sections of the very Act now in question did not apply to a case in which a foreign vessel was concerned.

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Besides, even if the Act should be held to apply to a case where a foreigner is Plaintiff, here the Defendants have obtained a definitive sentence in the Court of Admiralty, under which the ship has been arrested.

The VICE-CHANCELLOR.—That is no objection to the bill. I have decided in *Leycester v. Logan*(a) that the 514th section of this Act applies, notwithstanding judgment in the Admiralty Court condemning the ship.

Mr. *James*.—Then we rely on the former point, and upon all those authorities which have decided that *prima facie* an Act of the *British* Legislature must be construed to apply to *British* subjects, and not to foreigners, *e. g.* *Thomson v. The Advocate General*(b), *Attorney General v. Forbes*(c), *Arnold v. Arnold*(d), and *Jefferys v. Boosey*(e).

[They cited also the case of *The Milford*(f).]

Mr. *Amphlett*, Q. C., and Mr. *C. Hall*, in support of the bill, contended, that the Act, or at all events Part IX. under which the bill sought relief, applied to foreigners as well as to *British* subjects.

The “saving clause,” as it was called, at the end of that Part of the Act provided that nothing in the Ninth Part of the Act contained should be construed to extend to any *British* ship not being a recognised *British* ship within the meaning of the Act(g). Upon the Defendants’

(a) 3 K. & J. 446.

(e) 4 H. L. C. 815.

(b) 12 Cl. & F. 1.

(f) Law Times, April 3rd,

(c) 2 Cl. & F. 48.

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(d) 2 Myl. & Cr. 256, 270.

(g) Sect. 516.

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contention that clause should have run thus: "to any ship not being a recognised *British* ship within the meaning of the Act;" and the word "*British*" was superfluous.

But the whole Act shows, that, wherever the contrary was not expressed, ships generally, that is, ships of all countries, were intended. The interpretation clause (a) provides, that the word "ship" shall include "every description of vessel used in navigation, and not propelled by oars,"—irrespective, therefore, of the nation or country to which it belongs. The Second Part of the Act is intitled "*British* ships, their ownership, measurement, and registry," restricting that Part, therefore, of the Act expressly to *British* shipping, and implying that in other Parts of the Act not so expressly restricted, ships of all countries are included. A like inference arises from the title to the Fourth Part of the Act, which restricts the application of that Part to *British* ships, and to foreign steam ships of a certain description.

The argument, that foreign shipowners, and injuries done by their ships upon the high seas and beyond the jurisdiction of this country, are matters beyond the powers of the *British* Legislature, and with which, therefore, it could not have intended to deal, proves too much; for the Act expressly provides, that, whenever any injury has in any part of the world been caused to any property belonging to her Majesty or to any of her Majesty's subjects by any foreign ship, the judges of this country shall have power to detain such foreign ship until satisfaction has been made or security given to abide by the event of our legal proceedings (b).

The argument, that a foreign ship is not intended to be included unless expressly mentioned, is answered by those

(a) Sect. 2.

(b) Sect. 527.

Parts of the Act which relate to pilotage (a), lighthouses (b), and wrecks, casualties, and salvage (c), in which, although foreign ships are not expressly mentioned, and "ships" alone are spoken of, the Legislature must clearly have contemplated ships generally.

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But agreeing that neither the Act generally, nor the Ninth Part of it, under which the Plaintiffs seek relief, was intended to apply to foreigners, the Defendants in this case have applied to the tribunals of this country; having done so, they must abide by the *lex fori*, the law of the country to whose tribunals they have appealed; and by that law no owner of any sea-going ship shall, under circumstances like the present, be answerable in damages beyond the value of his ship and freight (d); and if sued in any other court of this country, he is entitled to the relief sought by the bill (e).

Besides, several of the Defendants, including the owners of the ship which has been lost, are *Americans*, and the *American* law adopts the same rule as our own with reference to the limitation of the liability of a shipowner under circumstances like the present.

[They cited the case of *The Saracen* (f) and the case of *The Johann Friedrich* (g).]

Mr. James, Q. C., in reply—

The argument that the *lex fori* entitles the Plaintiffs to limitation of liability, is a *petitio principii*, viz. that this Act of Parliament, which is the *lex fori*, has limited the

(a) Part V.
(b) Part VI.
(c) Part VIII.
(d) Sect. 504.

(e) Sect. 514.
(f) 4 Notes of Cas. in the Eccl.
& Marit. Courts, 498.
(g) 1 Rob. A.R. 35.

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liability of shipowners being foreigners. And as to the Fifth, Sixth, and Eighth Parts of the Act it does not follow, because certain special provisions as to pilotage, lighthouses, wrecks, and salvage must necessarily apply to certain foreign ships, that the general provisions of the Act apply to all.

As to the verbal criticism to which the Act is open, it has been consolidated from various other Acts, and that circumstance may account for some inaccuracies of expression.

Judgment reserved.

Before the VICE-CHANCELLOR delivered judgment, Mr. *Amphlett* asked leave to mention, in reference to the case of *The Carl Johann*, cited contra, and which was decided upon the Act 53 Geo. 3, c. 159, that by the 5th section of that Act it was provided, that nothing therein contained should extend to the owners of certain specified vessels, used solely in rivers or inland navigation, "or any ship or vessel not duly registered according to law"—a provision which, of itself, was conclusive of the question then before Lord *Stowell*.

May 3rd.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is one of considerable interest, and perhaps, as was observed by Dr. *Lushington* in the case of *The Zollverein*, is not altogether free from doubt or difficulty.

In construing any Act of the Legislature, the verbal construction of the particular section in question, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any degree of doubt or difficulty upon the wording of the particular section in

question, the Court is entitled to look, first, at the circumstances attending the passing of the Act, next at the preamble, as far as it affords any indication which may serve as a key to the interpretation of the Act, and then, I may add, to the whole purport and scope of the Act, to be collected from its various clauses other than the particular clause the meaning of which is in dispute.

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Now, as regards the construction of the particular section here in question, I apprehend there can be no doubt, that, if we were simply dealing with an Act of our own Legislature relating to shipping, there would be a clear presumption *a priori* that the Act referred simply to the ships of our own country, it being the plain and obvious rule in construing the enactments of any Legislature, that the Legislature of each independent country must be supposed to deal with those subject matters which are within its own control and jurisdiction. As Dr. *Lushington* expresses it in the case of *The Zollverein* (a)—“In looking to an Act of Parliament with reference to such a question as I am now discussing, viz. as to whether it is intended to apply to foreigners or not, I should, in endeavouring to ascertain the construction of the Act, always bear in mind the power of the *British* Legislature; for it is never to be presumed, unless the words are so clear that there can, by no possibility, be a mistake, that the *British* Legislature exceeded that power which, according to the law of the whole world, properly belonged to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further. *Prima facie*, therefore, it would not be the true construction of the clause presented for my consideration, that it is applicable to foreign ships on the high seas—matters in themselves entirely beyond the jurisdiction and scope of the Legislature of this country.”

(a) 2 Jur., N. S., 429.

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—
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However, there are other clauses of this Act of Parliament by which foreign vessels may occasionally be affected, and which may make it advisable to call in aid those additional guides to which I have referred for arriving at the true construction, namely the general circumstances under which the Act was passed, and the preamble of the Act.

Now, the circumstances under which this Act was passed and the preamble of the Act, in fact, resolve themselves into one question. Preamble of the Act, there is none beyond the recital, "that it is expedient to amend and consolidate the Acts relating to merchant shipping." Therefore, the circumstances under which it was passed are exactly narrated in the preamble. The Act was passed with the intention of consolidating and amending (which opens a little wider the question as to the law) the Acts relating to merchant shipping.

With reference to the subject of consolidation and amendment, it is a question always of grave difficulty—and it has especially been felt to be so by those who have had to deal with the subject of the consolidation of the statutes in general, and who have had to consider how far the object they have in view is to be attained by a process of mere consolidation, and how far amendments should be allowed,—what will be the effect of introducing the identical words of a former statute, but denuded of the preamble which has hitherto formed, in some degree, a key to its construction; what again will be the effect of combining the words introduced from a former statute with other clauses introduced by way of consolidation into the new statute, and which may have the effect of attaching to the words of the earlier Acts a construction entirely different from that which has hitherto prevailed upon these very words as they stand in their original context. In consolidating

various statutes—the Statute of Uses, for instance, and many others which have been the subjects of numerous judicial interpretations,—one sees at once the extreme difficulties to which such processes must give rise.

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For this reason, I should find myself placed in this case in some degree of difficulty, if I had to rely upon the decision of Lord *Stowell* in reference to the earlier Act of Parliament—the 53 Geo. 3, c. 159—an Act containing a preamble which the Act before me omits(*a*); and containing also (although, very singularly, this circumstance does not appear to have been adverted to in the judgment of Lord *Stowell*.) the clause to which my attention was directed this morning(*b*), and which would more especially have confined that Act to the subject matter of *British* shipping.

At the time when the existing law was consolidated under the Act the construction of which is now in question, the earlier Act of the 53 Geo. 3, c. 159, had thus been construed by Lord *Stowell* in the case of *The Carl Johann*, referred to in the case of *The Dundee*(*c*). In the case of *The Carl Johann*, the question arose whether the Act 53 Geo. 3, c. 159, was applicable to foreign owners; and Lord *Stowell* there makes these observations upon the subject—observations which are of importance independently of the actual construction of the statute itself: “Anciently,” he says, “the owners were, under the general law, civilly answerable for the total loss occasioned by the negligence or unskilfulness of the persons they employed;

(*a*) The preamble referred to commences as follows:—“Whereas it is of the utmost consequence and importance to promote the increase of the number of ships and vessels belonging to the United Kingdom registered ac-

cording to law, and to prevent any discouragement to merchants and others from being interested therein.”

(*b*) Sect. 5, vide *suprà*, p. 374.

(*c*) 1 Hagg. A. R. 113.

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but the avowed purpose of the relaxation of this rule of law was to protect the interest of those engaged in the mercantile shipping of the state" (that refers clearly to the preamble of the Act he was considering), "and to remove the terrors which would otherwise discourage people from embarking in the maritime commerce of a country in consequence of the indefinite responsibility which the ancient rule attached upon them. It was a measure evidently of policy, and established by countries for the encouragement of their own maritime interests."

The special clause to which my attention was directed this morning^(a) can scarcely have been overlooked in the argument of that case, but still it was open to argument whether the vessel which was there run down being a vessel within the Act of Parliament, that is to say, a registered *British* vessel, and the vessel by which she was run down being a *Swedish* ship, the owners of the *Swedish* ship could not claim the benefit of the Act in question.

The general law, however, which is there laid down by Lord *Stowell*, seems to me to be very material in coming to a conclusion as to the object of the present statute, framed as it is by way of consolidation of the law as it existed when the Act was passed. There is, as I have already observed, a clear presumption *à priori* that the present statute is framed, so far as it gives remedy or relief, for the purpose of providing for the shipping of this country; but further than that, I am led necessarily to the same conclusion by the consideration that the general law, as Lord *Stowell* calls it—meaning, as I apprehend, not the common law of this country, but that of nations—with regard to injuries of this description, has provided a more extensive remedy than that provided by the present Act, which limits the liability of the shipowner to the value of the ship and freight.

(a) 53 Geo. 3, c. 159, s. 5; *supra*, p. 374.

Such being the general law, the question at once arises, in considering the interpretation which the Plaintiffs attempt to put upon the Act now under discussion, whether the Legislature of this country has a right to restrict the privileges which foreign owners would enjoy under the general law of nations, and say, "whenever you are run down by a *British* ship upon the high seas, if you seek your remedy under the general law of nations, which would entitle you to full damages in respect of all the injury you have sustained, you are to be tied down by the municipal law of this country to the limited relief we have thought proper to give." I apprehend such a construction would, in the words of Dr. *Lushington*, be the last I ought to adopt. It would be to impute to the *British* Legislature an attempt to legislate for foreigners, by taking away those rights and privileges which they enjoy by the general law, which gives full compensation for damages, and to tie them down to a remedy limited to a portion of the property of the owner of the particular ship which has inflicted the damage.

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Such a course of proceeding would be, as regards many countries, extremely inequitable in another point of view. The Legislature of this nation—a vast maritime nation, with an immense commercial marine—might not unreasonably say to the owners of ships of another large maritime nation, "Looking to the large number of vessels of our two countries plying to every quarter of the globe, the chance is as equal to the one as it is to the other of doing serious damage; and inasmuch as, if shipowners are to be made liable for the negligence of their servants to the total amount of their fortunes, the consequence will be to discourage persons from risking their capital in the mercantile marine, it is desirable that we should curtail the principles of general law in settling the amount to which the sufferer shall be entitled in cases of collision and loss

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by reason of such negligence." But to adopt such a course with reference to other nations not so circumstanced, would be extremely inequitable, independently of the general consideration of the impropriety of legislating for foreigners and restricting their natural rights. There are many nations in *Europe* with a much more limited marine than our own, who, in sailing along the narrow seas of *Europe*, are far more in danger of receiving than of inflicting damage, by reason of the small number, and I might add, the small description of vessels they employ, compared with our own commercial navy; and in reference to the ships of such nations, it would be unreasonable to suppose there was an intention on the part of the Legislature to restrict the owners in the exercise of that which is their natural right, viz. to recover damages to the full amount of the injury they may sustain. Such an interpretation of the Act in question seems to me so contrary to all principle, that nothing short of some conclusive argument from the general frame and scope of the Act would lead me to adopt it.

Now, when I come to consider the general frame and scope of the Act, I find that which at first sight appears in some degree to favour the contention of the Petitioners. I do not advert to the definition of the word "ship"^(a), which strikes me, as it appears to have struck Dr. *Lushington* in the case of *The Zollverein*, as defining simply the description of vessels to which the word "ship" is to extend, without reference to their nationality. The interpretation clause contains nothing from which I can judge whether it was intended that the word "ship," which *prima facie* would, I apprehend, have meant an *English* ship, was to have a larger and more general signification; but when I come to the various Parts into which the Act is divided,

(a) The 2nd section of the Act provides that the word "ship" shall include every description of vessel used in navigation not propelled by oars.

there seem to be some portions of it which specifically point to *British* ships.

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The Second Part of the Act is headed "*British* ships : their ownership, measurement, and registry." Some sort of inference may be raised upon that heading, that, when *British* ships are not named in the Act, ships generally are to be intended, that is to say, all ships.

The Fourth Part, which is headed "Safety and prevention of accidents," and which contains the sections Dr. *Lushington* had to consider in the case of *The Zollverein*, commences thus :—"The Fourth Part of this Act shall apply to all *British* ships; and all foreign steam-ships, carrying passengers between places in the United Kingdom, shall be subject to all the provisions contained in the Fourth Part of this Act, and likewise to the same provisions with respect to the certificates of the masters and mates thereof to which *British* steam-ships are subject." Taking the whole of that together, the wording is rather favourable to the contention that foreign ships are not intended, except where specifically adverted to; and, in the case where they are so adverted to, I find it is a most reasonable Act of the Legislature, and not contrary to any of the principles to which I have been referring, which would prevent the Court from concluding that foreign ships were to be brought under the control of the Legislature of this country. It alludes to steam-ships carrying passengers from one part of the United Kingdom to another. Nothing could be more reasonable than for any country to say, "As you are passing along our seas from port to port, you shall be subject to the rules and regulations which our Legislature thinks fit to impose upon all those who are either occasioning or suffering hazard or damage."

Another section, on which the Plaintiffs rely, is the 527th,—the very section under which the Plaintiffs in the

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Admiralty Court are taking the proceedings which the Plaintiffs in equity now seek to restrain. This also is a special clause, and directs what is to be done whenever any injury has, in any part of the world, been caused to any property belonging to the Queen or to any of her subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast :—showing again, by the special manner in which that case is provided for, the intention of the Legislature, so far, to deal only with foreign ships to the extent that is reasonable and right; and nothing can be more right and reasonable than the provision of that section, viz. that, in such a case, if you find the ship of the wrongdoer within your jurisdiction, you should be at liberty to detain it until satisfaction has been made in respect of the injury, or until security has been given to abide by the event of legal proceedings in the Courts of this country.

I ought, also, to notice the argument, that there are other Parts of the Act, such as Part V., which relates to pilotage, Part VI., which relates to lighthouses, and Part VIII., headed “wrecks, casualties, and salvage,” which must, it was said, apply to foreigners, although “foreign ships” are not expressly mentioned, and the word “ship” alone is used. As to that, it is by no means clear to my mind that those Parts of the Act have necessarily a general application to all foreign ships; but if they have, it can only arise from the circumstance on which the argument is based, viz. that such is the necessary construction of those particular Parts of the Act; and that there, again, the right to legislate arises from the necessity of dealing with what takes place upon our own shores, and within the proper and immediate jurisdiction of our own Legislature. With regard to salvage, for instance, that is, wrecks upon our own shores, it is but reasonable that the Legislature of this country should deal

with that subject as it thinks proper; and the same remark applies to the provisions as to pilots and the piloting of ships within the narrow seas forming a part of the realm of the United Kingdom, and as to the dues payable for the use of ports and harbours and of the lighthouses and other things upon our own shores,—all matters necessarily requiring legislation to regulate them. In all these instances, from the nature of the case, this country would have a right to legislate for ships generally, whether of its own subjects or of foreigners; and the latter, if necessarily included, would be understood to be so without being expressly mentioned in the provisions of the Act relative to that subject.

But the Ninth Part of the Act is that which contains the particular section the meaning of which I have to determine. The Ninth Part of the Act deals generally with the subject of damage done by ships, wherever such damage may be done.

In the case before me it is damage done by one *American* ship to another *American* ship upon the high seas. Now, hitherto, I have considered only the question as between a ship of this country and a ship of a foreign country. Even in such a case it appeared to me, as I have said, that it would be beyond the province of the Legislature of this country, and unreasonable and inequitable, to legislate; but to suppose that the Legislature of this country had it in contemplation to restrict the common natural rights I have referred to as between two ships both belonging to foreign countries on the high seas, would be still more startling than to presume that it intended to deal with foreigners in a case where those who are affected by the act of such foreigners are *British* subjects, and amenable therefore to the Acts of the Legislature. It would be a presumption of a most singular character to

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suppose that the Legislature intended to frame a contract contrary, as Lord *Stowell* expresses it, to the natural law to be binding upon two foreigners, neither of whom it could have a right in any way to affect, by interfering either with the general law of nations, or with the peculiar municipal law, if I may so term it, to which the foreigners in question would have recourse in their dealings with each other.

It was contended upon this part of the case, that the *lex fori* should prevail, upon those general grounds upon which the *lex fori* has been held to operate. But it is clearly laid down by Dr. *Lushington* in the case of *The Zollverein*, citing with approbation Mr. Justice *Story's* work upon the subject^(a), that, although the *lex fori* has application to everything concerning the *form* of the procedure, with regard to the *substance* of the proceeding it has no application whatever. And clearly an Act, which limits the damages to which the shipowner is to be liable under circumstances like the present, deals with the substance and not the form of the procedure. It in effect forms a contract, that, whereas by the natural law, the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss he has sustained, all those persons upon whom the Legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law—the common law, as we should call it in *England*—would give them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted,

(a) "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern: In iis quæ spectant decisoria causæ, et litis decisionem, inspicuntur statuta loci ubi contractus fuit celebratus. But the forms of reme-

dies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the Act." *Story's Conf. of Laws*, sect. 558.

and of the freight due or to grow due in respect of such ship during the voyage.

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To return, however, to the Ninth Part of the Act, and the wording of the particular section now in question.—The Ninth Part of the Act is headed “liability of shipowners,” and commences thus: “The Ninth Part of this Act shall apply to the whole of her Majesty’s dominions.” That of itself is unfavourable rather than otherwise to the Plaintiffs’ contention, from the inference it may raise, that, inasmuch as that Part of the Act is expressly extended beyond *Great Britain* to the whole of her Majesty’s dominions, it was not meant to extend to anything taking place beyond that sphere; although it may not be inconsistent with the Plaintiffs’ contention, that, when the litigation takes place within her Majesty’s dominions, this Part of the Act is to apply to such litigation.

The Act then proceeds thus: “No owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things, that is to say—

“(1). Of or to any goods, merchandise, or other things whatsoever, taken in or put on board any such ship, by reason of any fire happening on board such ship;

“(2). Of or to any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board any such ship by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles,

“To any extent whatever.”(a)

(a) Sect. 503.

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Now, it would be a most singular restriction for us to impose upon a foreigner, to enact, that when a foreign ship is run down, and articles of that description are lost or damaged, no liability whatever shall be incurred except under the circumstances mentioned in that section. Certainly, there is nothing in that section to lead to the inference that foreign vessels were in the contemplation of the Legislature.

Then the 504th section (which is the one now in question) enacts as follows: "No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity, that is to say—

"(1). Where any loss of life or personal injury is caused to any person being carried in such ship;

"(2). Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

"(3). Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;

"(4). Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat," (that is the clause here in question)

"Be answerable in damages to an extent beyond the value of his ship, and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for."

Now, even if the section stopped there, it would seem, as I said before, upon the principle I have endeavoured to

enuntiate, a very singular supposition that the Legislature intended to cut down the right of a foreigner, even as against a *British* owner, and still more as against another foreign owner, from that large remedy, which, but for the species of contract imposed by the Act, he would have had, to the special and limited remedy to which the Act restricts the rights of its own subjects. But then comes, at the end of the section, a proviso, which is unquestionably of great importance in construing the whole section, viz. "that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship, and the freight thereof, be taken to be less than fifteen pounds per registered ton."

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There I have at once a provision which can only refer to *British* ships. The registered ton is a quantity ascertained by *British* law. The system of registration by tonnage is imposed by that law in a series of very special and minute directions. It is a system extremely artificial, peculiar to the navy or shipping of this country, and not recognised by foreign nations; and in case of damage done by a foreign ship, it would be extremely difficult, if not impossible, to ascertain the tonnage of the ship by which the damage was done.

Besides, while it is plain upon that section of the Act, that a contract is imposed by the Legislature upon persons who take proceedings against shipowners in respect of such loss and damage as there mentioned, that they shall not recover in damages to an extent beyond the value of the ship and freight, it is no less clear, that, while the common right is restricted in that respect, it is extended and enlarged in another respect by the proviso at the end of the section, that if you have sustained personal injury, or if you are the executor of a person whose life has been destroyed under the circumstances mentioned in the Act, and entitled

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to recover for such injury or loss of life, you shall in no case have the value of the ship and freight estimated at less than 15*l.* per ton. But here again, there is an additional argument against the supposition that the section was intended to apply to foreigners. For, in case of personal injury or loss of life under circumstances of this nature, attributable to a foreign ship, how could the party complaining ever exercise the enlarged right there given by the Act? I apprehend it would not be according to natural law—that law which governs all civilised nations,—that any compensation whatever should be recovered for loss of life. It is not even the common law of this country, however reasonable it may be, that a person whose life has been destroyed should through his executors seek a remedy for that loss; and the same, I apprehend, is true of the general law of most *European* nations. The very circumstance, therefore, of this provision being introduced is a strong indication that when the Legislature was laying down the previous rules for the limitation of liability and restriction of damage, it intended those rules to be applicable to *British* shipping and to *British* shipping only.

Then the Act contains, in the 507th and following sections, an elaborate series of provisions under the head “mode of procedure,” which do not in the least contemplate a case in which a foreigner is a party interested. In case of loss of life or personal injury the Board of Trade may institute certain inquiries as to the persons killed or injured (*a*):—all matters as to which independently of the Act a foreigner would be under no liability whatever;—and then rules are laid down as to how money paid for damage is to be accounted for between part-owners (*b*).

Then I come, in the 516th section, headed “saving clause,” to the only passage upon which any possible

(*a*) Sect. 507.

(*b*) Sect. 515.

doubt can be suggested as to the construction, and which is in these words:—"Nothing in the Ninth Part of this Act contained shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part-owner of the ship to which he belongs, is subject in his capacity of master or seaman, or to extend to any *British* ship not being a recognised *British* ship within the meaning of this Act."

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The argument upon that section was, that, unless the whole of the Ninth Part of the Act was intended to apply to foreign as well as *British* shipping, the mention of a *British* ship would have been superfluous. The Legislature would have said, that nothing in that Part of the Act contained should be construed "to extend to any *ship* not being a recognised *British* ship within the meaning of this Act."

But it seems to me, that this criticism upon the wording of the Act, however plausible, is far too insignificant to override those higher principles of construction, which appear to me, as they did to Dr. *Lushington* in the case of *The Zollverein*, to be the principles by which the decision of the Court must necessarily be governed. I have already observed upon the singular circumstance, that, in the short report of the case of *The Carl Johann*, the 5th section of the Act there in question, which of itself would seem conclusive of the point in dispute, does not appear to have been referred to. It is, also, somewhat singular, that, in the case of *The Zollverein*, Dr. *Lushington* does not refer to the circumstance, that the sections(a) of the Act with which he was there dealing, are expressly applicable "to all *British* ships," and to foreign ships of a certain character, viz. "all foreign steam-ships carrying passengers between places in the United Kingdom"(b), that character being one to which

(a) 17 & 18 Vict. c. 104, ss. 296, 298, 299.

(b) Sect. 291.

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the vessel then in question did not belong. At the same time, I have the great advantage of learning from those cases the opinions formed by such minds as those of Lord *Stowell* and Dr. *Lushington*,—so peculiarly competent to deal with questions of international law of this description—as to the general principles which ought to regulate me in deciding this case; and I decide it entirely upon those general principles, which, to my mind, render it proper for every Court of judicature, in construing the enactments of any Legislature, to presume, *prima facie*, and, unless the contrary be expressed, or be implied from the absolute necessity of the case, that such Legislature intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights. In construing our own statutes, no other rule can be a sound rule to adopt, unless it be clear, from the absolute necessity of the case, that the Legislature intended to affect the rights of foreigners. I find no such necessity in the Act before me, either in the “saving clause” which I have discussed, or in any other part of the Act. I find nothing in the Act to show that the Legislature intended by the Part of the Act now in question—the Ninth Part of the Act—either to restrict or to enlarge the rights of any foreigners in respect of matters occurring out of its jurisdiction, even in a question between a foreigner and one of our own subjects, still less in a question between two foreigners; and I hold further, that the *lex fori* cannot be applicable to a case like the present, inasmuch as the section in question relates not to the form of judicial procedure, but to the very substance of the matter in respect of which such procedure is to take place. The whole section is founded upon a particular species of legal contract, which cannot be imposed by our Legislature as between its own subjects and foreigners not subject to its jurisdiction, still less as between two foreigners whose

rights must be governed by entirely different laws, as well as by different modes of procedure.

I have not commented upon what was alleged in the argument in support of the bill, that the *American* law is identical with our own upon the point in question, because that is not averred upon the bill; and, not being averred, I cannot take cognizance of it. If that were averred and proved, a case of a different description might arise between the Plaintiffs and such (if any) of the Defendants as may be *Americans*.—I should be competent to administer *American* law between *Americans* coming here for relief.

As regards such of the Defendants who have demurred as are *English*, it will be useless to amend; for, as against them, no amendment will better the Plaintiffs' case. Therefore, if none but *English* have demurred, I should prefer not giving liberty to amend.

Mr. *Amphlett*.—It does not appear whether all the demurring Defendants are *English*.

The VICE-CHANCELLOR.—If it does not so appear, I will give liberty to amend generally, simply because it does not appear; but as regards such of them as are *English*, I entertain no doubt.

DEMURRER allowed. Liberty to amend within a week.

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*Minute of
Order.*

The Defendants appealed; but the LORDS JUSTICES, after a rehearing of some days duration, and having reserved judgment, now dismissed the appeal with costs.

June 12th.
—
LORDS JUSTICES.

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May 3rd.

ANDREWS v. HULSE.

*Copyholds—
Seizure of, by
Lord—Juris-
diction to re-
lieve against—
Demurrer.*

This Court has concurrent jurisdiction with Courts of law to relieve a copyholder against an illegal seizure of the copyhold property by the lord of the manor.

Demurrer to a bill for such relief over-ruled.

THE bill, filed by *Charles Andrews* and *Eliza Ann* his wife, before her marriage with him *Eliza Ann Brickwell*, spinster, stated, that at a court holden in April, 1856, for the manor of *Cockermouth*, in *Dagenham*, in the county of *Essex*, of which the Defendant *Charles Hulse* was lord, the Plaintiff, by her then name of *Eliza Ann Brickwell*, spinster, was admitted to certain copyhold hereditaments, parcel of the said manor, and which were then subject to a lease to the Defendant *Palmer* for fourteen years from Michaelmas, 1853, to hold to her, her heirs and assigns, according to the custom of the manor.

Then, after setting out a correspondence between one *Edward Sage*, the steward of the manor, and the Plaintiffs' solicitor, with a view to an enfranchisement of the copyhold premises which the lord desired to have effected, the bill proceeded to state, that, notwithstanding such negotiations were pending, without any further communication whatever between *Sage* and *Metcalfe*, without any notice or intimation from the Defendant *Hulse* or his steward to the Plaintiffs or any of them, that it was his intention to seize the premises or any of them as for a forfeiture, without the presentment by the homage of the manor of any act of forfeiture on the part of the Plaintiff *Eliza Ann*, and without any proclamation, the Defendant *Hulse*, by his steward, on the 10th of December, 1857, directed his bailiff to seize the aforesaid copyhold hereditaments, and the bailiff accordingly seized the same, and the Defendant *Hulse* thereupon (as he alleged) procured the Defendant *Palmer* to attorn tenant thereof to him *Hulse*.

The bill stated, that the first intimation or knowledge

which the Plaintiffs had of such seizure and attornment was conveyed to *Metcalfe* by the following letter from *Sage*, dated January 8, 1858:—

“Manor of *Cockermouth*, re *Brickwell*. I herewith send you copy of the proceedings which have taken place as to this estate.”

This letter inclosed the following paper writings:—

“Manor of *Cockermouth*, in *Dagenham*, in the county of *Essex*.

“To Mr. *George Parsons*, bailiff of the court of the said manor:

“Whereas *Eliza Ann Brickwell*, a copyhold or customary tenant of this manor, hath committed divers acts, whereby the copyhold or customary estate of her the said *Eliza Ann Brickwell* has become forfeited to the lord of this manor, and which said acts are as follows, viz. the said *Eliza Ann Brickwell* hath at divers times fallen timber growing upon the said copyhold estate without license from the lord; and the said *Eliza Ann Brickwell* hath also at divers times dug and sold and received money for gravel taken from the said copyhold estate without a license from the lord so to do; and hath also wilfully neglected to pay the lord of the said manor the annual quit rent due upon and from the said estate; and whereas the said *Eliza Ann Brickwell* hath neglected to attend the general court baron of the lord of this manor to do her suit and service, although duly summoned to do so: It is, therefore, commanded and ordered that you, the said *George Parsons*, do seize, and you are hereby authorised and required to seize all the said copyhold estate, farm, lands, and hereditaments, with the appurtenances, so forfeited as aforesaid, into the hands of the lord of the said manor, and that you answer to him the profits and esplees thereof: And you are also commanded and ordered to answer to the lord the profits and esplees of the premises,

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and make your return to this precept at the next general court baron to be holden for the said manor at the *Cross Keys Inn, Dagenham*, on Thursday, the 17th day of December instant, at twelve o'clock at noon. Given under my hand and seal this 10th day of December, 1857.

"Edward Sage."

"By virtue of the within precept, I have, in the presence of *Edward Sage*, steward of the manor, seized the within-mentioned lands and premises into the hands of the lord, as commanded by the within precept.

"George Parsons."

"I, *Thomas Palmer*, the tenant of the above property, do hereby attorn tenant to *Charles Hulse*, the lord of the manor, in pursuance of the seizure this day made, and hereby pay one shilling on account of rent.

"Thomas Palmer."

"17th December, 1857. At a court then held for the manor of *Cockermouth*, the bailiff returned, that, by virtue of the within precept, he had seized the premises therein mentioned into the hands of the lord.

"Edward Sage, Steward."

The Plaintiffs denied, by their bill, all the alleged acts of forfeiture mentioned in the precept of the 10th of December, 1857. They also denied that the Plaintiff *Eliza Ann* had ever been duly or personally summoned to attend at any court; and averred, that, upon the only occasion of a summons being served upon her solicitor on her behalf, it was, as the Defendant well knew, impossible for her to attend, by reason of her absence in *India*.

The bill averred, that the Defendant *Palmer* had an interest in the subject matter of the suit.

The bill prayed—(1). That it might be declared that the seizure of the copyhold hereditaments was not justified by the circumstances, and that the same might be set aside; and that the Plaintiffs might be relieved in respect thereof, and in respect of the attornment by the Defendant *Palmer*. (2). That it might be declared that the Plaintiff *Eliza Ann* ought to be reinstated as a copyholder of the manor, and restored to the possession or receipt of the rents and profits of the premises, and, if necessary, to be readmitted to the said estate; and that the Defendant *Hulse*, and his steward and bailiffs, might be decreed to restore the possession of the same, and, if necessary, to readmit her thereto; and that the Defendant *Hulse* might be decreed to account to the Plaintiffs for any rents and profits received by him in respect of the said estate since the seizure. (3). That the attornment by *Palmer* to *Hulse* might be declared to be void and of no effect; and that, if necessary, *Palmer* might be decreed to attorn or re-attorn tenant to the Plaintiff *Eliza Ann*, the Plaintiffs being willing to waive any forfeiture he might have incurred of his estate and interest under the lease. (4). That the Defendant *Hulse*, his steward, bailiffs, and agents, might be restrained by injunction from insisting upon the alleged acts of forfeiture and enforcing the seizure, and from commencing and prosecuting any proceedings at law or otherwise for the purpose of enfranchising the same, and from collecting and recovering the rents and profits of the said copyhold estate and hereditaments, and from preventing or in any way interfering with the receipts of such rents and profits on the part of the Plaintiff *Eliza Ann*. And, (5), if necessary, for a receiver.

Both Defendants put in demurrers to the bill for want of equity.

Mr. *James*, Q. C., and Mr. *Erskine*, in support of the demurrer :—

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Upon the averments in the bill, the seizure in respect of which the Plaintiffs seek relief is simply illegal, and amounts to a mere case of trespass, for which the proper remedy is at law.

The Plaintiffs' case is, that there has been no legal forfeiture. All the acts of forfeiture alleged in the precept of the 10th of December, 1857, are in effect denied by the bill; and, as regards the non-attendance of the Plaintiff at the lord's court, if, as the bill avers, she has not been duly summoned,—if, when her solicitor was served with a summons, it was impossible for her to attend, by reason of her being abroad,—those grounds of defence are as available at law as here. Even at law, the lord cannot oust the copyholder against the custom of the manor(a). In very early times it was otherwise; but Lord *Coke* states, that, even in his day, it was "clear and without question that the lord cannot at his pleasure put out the lawful copyholder without some cause of forfeiture; and if he do, the copyholder may have an action of trespass against him; for, albeit he is 'tenens ad voluntatem domini,' yet it is 'secundum consuetudinem manerii (b).'" And the same is laid down in 1 Leon. 4, 4 Leon. 118, and *Doe d. Le Keux v. Harrison*(c); all of which authorities show clearly the right of the copyholder to relief in an action at law under circumstances like the present.

[They cited also *Job v. Banister* (d), *Nokes v. Gibbon* (e), *Widowson v. The Earl of Harrington* (f), and *Sir Harry Peachey v. The Duke of Somerset* (g).]

The VICE-CHANCELLOR.—There are some old cases in

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| (a) Co Litt. 63. a. | (e) 3 Drew. 681. |
| (b) Id. 60. b. | (f) 1 Jac. & W. 532. |
| (c) 6 Q. B. 631. | (g) 1 Stra. 447. |
| (d) 2 K. & J. 374; since affirmed on appeal. | |

which this Court has assumed jurisdiction where the lord has insisted on a forfeiture for alleged acts of waste by the copyholder. One is *Litton's case* (a), of which I find this report in *Cary*:—"A copyholder within age is admitted, and the lord committeth the custody to the mother of the infant, whose undertenant cutteth down timber trees, which being presented the lord seizeth the land for the forfeiture (during still the nonage) and keepeth it till he dieth, and it descendeth to his heir, who and his father had kept it forty years; and for that the copyholder moved suit in the Chancery twenty-nine years since, which was now revived, and the forfeiture was taken during his minority: he was restored to his possession till the lord should recover it for the forfeiture by the common law."

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The other is a case in *Viner*, where, the lord having refused to admit a copyholder because woods had been cut upon the copyhold lands, upon bill filed by the copyholder, the lord was ordered to admit him, upon the ground that the Defendant could not prove that the same had been done by the Plaintiff's direction, but by an undertenant(b).

Mr. *James*.—The lord refusing to admit may be ordered to admit, and for that purpose this Court may have jurisdiction; but here the Plaintiff has been admitted, and for every purpose of her suit her remedy is as clear and beneficial at law as it can possibly be here. She says, there has been no legal forfeiture; and if so, her rights are complete at law.

Mr. *Rolt*, Q. C., Mr. *Baddeley*, and Mr. *Humphry*, in support of the bill:—

Assuming this to be a case of simple trespass, as contended—a mere case of ouster by the lord, without any

(a) *Cary* 8.

(b) *Viner's Abridgment*, "Copyholder;" E. d. pl. 2 (Vol. vi. p. 152).

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special circumstance affording ground for the contention that the remedy will be more complete in this Court than at law, this demurrer must be overruled. The authorities show that if this Court was not the first to assume jurisdiction to relieve a copyholder against an unconscientious seizure by the lord, it has at least exercised a concurrent jurisdiction in such cases from the earliest times. Thus, *Fitzherbert* says, "Tenaunt a volunté par copy de court roll' aver sub pena vers son seignour s'il lui oust" (*Fitzherbert's* Abridgment "Subpoena" 21); and the grounds are thus stated by Sir *George Cary*, citing *Fitzherbert's Natura Brevium*, and this very passage from the Abridgment:—"Touching copyholders, Mr. *Fitzherbert*, in his *Natura Brevium*, folio 12, noteth well, that, forasmuch as he cannot have any writ of false judgment, nor other remedy at common law against the lord, therefore he shall have aid in Chancery; and, therefore, if the lord will put out his copyholder that payeth his customs and services, or will not admit him to whose use a surrender is made, or will not hold his court for the benefit of his copyholder, or will exact fines arbitrary where they be customary and certain, the copyholder shall have a subpoena to restrain or compel him, as the case may require: *Dyer*, 264, 124; *Fitzh. Subp.* 21" (a). And Lord *Coke*, in his "Complete Copyholder," lays it down in the most explicit manner, that, if in his day the copyholder had a remedy at law, it was at his election to proceed also in equity in cases of illegal forfeiture. After describing the difficulties to which in former times this tenure was exposed, he says:—"But now copyholders stand upon a sure ground; now they weigh not their lord's displeasure; they shake not at every sudden blast of wind; they eat, drink, and sleep securely, only having a special care of the main chance, viz. to perform carefully what duties and services soever their tenure doth exact and custom doth require. Then

(a) Car. Rep. p. 3.

let lord frown, the copyholder cares not, knowing himself safe and not within any danger. For, if the lord's anger grow to expulsion, the law hath provided several weapons of remedy; for it is at his election either to sue a subpoena or an action of trespass against the lord. Time hath dealt very favourably with copyholders in this respect"(a). Again, Chief Baron *Comyn*, after laying it down, that, if the lord refuses admittance, the copyholder may sue in Chancery, and shall be there relieved, adds this:—"So, if the lord ousts his tenant without cause"(b). In this case, therefore, even if there were an adequate remedy at law, equity would have concurrent jurisdiction.

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But here there is no remedy at law. The lord having procured the Defendant *Palmer* to attorn to him, so long as *Palmer's* tenancy lasts—for the next ten years to come—the Plaintiff can have no action of trespass against the lord. The tenant colluding with the lord, the Plaintiff cannot use his name in an action of trespass or in ejectment; and as to an action on the case, that action cannot be maintained by a reversioner, unless there be damage to the reversion: *Baxter v. Taylor* (c).

The VICE-CHANCELLOR.—You could proceed against the tenant for rent.

Mr. *Baddeley*.—But he has attorned to the lord; and if he has already paid his rent to the lord, the Plaintiff cannot compel him to pay a second time.

Then, as to a sale: with this question pending as a cloud upon her title, it would be impossible for the Plaintiff to sell.

[They cited also *Roswell's case* (d), and 1 Eq. Ca. Abr. 118.]

(a) Coke's Compl. Copyhold. s. ix. (b) Com. Dig. "Copyhold," P. 2.

(c) 4 B. & Ad. 72.

(d) 3 Dyer, 264 a.

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Mr. James, Q. C., in reply:—

If this Court has jurisdiction to relieve a copyholder, it is only under special circumstances, and for special purposes. It may well be, that equity can compel the lord to admit a copyholder, or to hold his court and entertain complaints, and can prevent him from exacting more than the customary fines. But here no such circumstance exists, no such relief is sought. As to the interposition of the tenancy for years, if what has happened here had happened in the case of freeholds, that would not have been an argument for coming here for relief. And as to the argument, that what the lord has done will be a cloud upon the Plaintiff's title, that might have been so formerly, but now the rights of copyholders are as well ascertained, and as fixed and certain, as in the case of freehold property.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I must overrule this demurrer, regard being had to the older authorities. The case in *Cary* (a) almost amounts to an actual decision on the subject; and, independently of that case, the dicta cited in support of the bill are of the highest possible authority.

The dicta stand thus: In the first place, I find Lord *Coke* stating, that, whereas in former times the copyholder had no remedy in respect of the weakness of his title, in his day he had acquired a right to relief in this Court, not only in the event of the lord refusing him admittance, but also in the event of his wilfully depriving him of possession: "If the lord's anger grow to expulsion, it is at his" the copyholder's "election either to sue a subpoena

(a) *Litton's case*, Car. 8, vide *supra*, p. 397

or an action of trespass against the lord"(a). It is clear, from his mentioning an action of trespass, that Lord *Coke's* mind is there directed, not merely, as was suggested in argument, to a case in which the lord might refuse to entertain plaints in his court, which is one of the numerous cases put by *Fitzherbert*(b) as giving the tenant a right to relief, but to some act of ouster or "expulsion," as he terms it, on the part of the lord. The tenant, he says, if expelled or ousted by the lord, has his remedy in this Court as well as at law; and it is at his election to proceed either by subpcena or by action of trespass.

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Then, I find Chief Baron *Comyn*, himself a considerable authority, adopting what Lord *Coke* has there said, and recognising it as the law as it existed in his day(c). And I have also the note in *Fitzherbert's* Abridgment, that if the lord ousts the tenant the tenant shall have subpcena(d).

From those dicta, which, independently of their own weight and authority, are entitled to additional consideration on account of their early date,—approaching so much nearer to the times to which they refer than the present, when the rights of the copyholder have matured into a possession in the eye of the law,—it is clear, that, in the early stages of that process, which has now reached maturity, out of regard to the then weakness of the copyholder's title, this Court, if it did not take the initiative, at all events exercised a concurrent jurisdiction with Courts of law, in providing a remedy for the copyholder in the event of his being ousted by the lord; and that the copyholder had his remedy by subpcena as well as by an action of trespass.

(a) *Coke's* Compl. Copyhold. s. ix. (c) *Com. Dig.* "Copyhold," P. 2.
 (b) *Nat. Brev.* p. 12, *supra*, p. 398. (d) *Fitz. Abr.* tit. "Subpcena," 21.

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Then, if I once arrive at the position, that the Court has ever exercised concurrent jurisdiction, I apprehend it would not be proper, on demurrer, to abdicate it even in a case where there might be strong averments on the face of the bill to show, not only that there is a remedy at law, but that the remedy at law is as clear and simple, and as advantageous to the copyholder, as the remedy in equity. I take it, that, even in the clearest case that could be put of a simple ouster, unaccompanied by any entry on the court rolls,—in a case in which the act complained of was mere trespass, and the tenant, therefore, had a right to proceed immediately by ejectment,—although it would probably be competent to the Court to say, assuming jurisdiction, the case is not proved, and, therefore, it appears to us to be a case on which it is not proper for us to act,—yet, still the Court would not stop the suit in limine upon demurrer, but would wait until the time came for the trial of the right, reserving to itself all its powers with regard to costs, which powers it would exercise if costs were uselessly occasioned by taking this circuitous process. The Court would not abdicate a right which had once existed, and which, having once existed, no subsequent proceedings of any Court of law could determine.

In the case before me, I must say there are considerable grounds for contending, that, if the jurisdiction ever existed, which, on those ancient dicta, fortified by the case in *Cary* (a), it would seem the Court has exercised, the circumstances averred in this bill present strong additional reasons for exercising that jurisdiction. It may be true, that there are remedies at law; but they are remedies, which, under the circumstances of this case, would be accompanied with considerable difficulty and embarrassment, amounting in effect to this, that, unless the Plaintiffs be willing to put an end to the lease of their tenant by taking proceedings against him to

(a) *Litton's case*, Car. p. 8.

enforce a forfeiture, so as to proceed at once against the lord, either by ejectment or trespass, for the wrong which, as they allege, they have sustained at his hands, they must wait until the determination of the lease before their rights can be ascertained; and in the meantime, I find it averred on the face of the bill, a notice has been served on the Plaintiffs by the steward of the manor, which professes to be a "copy of the proceedings that have taken place," consisting, first, of a precept to the bailiff to seize all the Plaintiffs' estate, and to make his return thereto to the general court baron to be held for the manor; secondly, of another document purporting to be signed by the steward, and apparently an extract from the court rolls, which is in these words: "17 December, 1857. At a court then held for the manor of *Cockermouth*, the bailiff returned, that, by virtue of the within precept, he had seized the premises therein mentioned into the hands of the lord." So that the case is not that which was suggested in argument, and which may constantly of course happen, of a stranger asserting a right and procuring the tenant to attorn to him during a lease, thus compelling the reversioner either to insist that the tenant has forfeited his lease, in order to bring ejectment, or to wait for the termination of the lease before he can try his right against the parties who have attempted to dispossess him. It is a case in which the copyholder has recorded against him an entry such as I have described, and which must necessarily form a considerable difficulty in his way in dealing in future with the property, and a blot upon his title.

It, therefore, appears to me, that, even if I were to adopt (which I do not) the narrower view of the jurisdiction of the Court in cases of this description, and to hold that the jurisdiction cannot be assumed except where the lord is acting inequitably, by taking or refusing to take some step in his court, or by doing some other act which a Court of

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equity has a right to correct—in a case in which I find the lord entering on the rolls a history like this of a forfeiture and its reasons, and so placing a blot on the title of the Plaintiffs, who aver throughout (and this formed the principal ground of the Defendants' argument as to there being so plain a remedy at law,) that no forfeiture has actually occurred—the jurisdiction, even according to that narrower view of it, would attach.

It appears to me, that, assuming the jurisdiction ever to have existed—which I must assume, having regard to the grave authorities to which I have referred, and which I find nothing to contradict in any subsequent case—if it was ever at the election of a copyholder to proceed by subpoena in this Court, I ought not upon demurrer to deprive him of it.

In overruling the demurrer, I shall reserve the costs until the hearing of the cause; for if the result of the proceedings should be, to show that relief is to be sought in a Court of law, it would be very unreasonable that the Defendants should be put to additional costs by proceedings in this Court.

With respect to the demurrer put in by the tenant, it is not averred that he ever attorned;—the averment is only that the lord says he has attorned. But there is an averment that he is interested, and he must be interested quâcunque viâ, whether he has attorned or not, in the decision of the cause. I shall therefore overrule both the demurrers.

Ordered accordingly.

1858.

SCHENK v. AGNEW.

HILLYAR POPE, by his will, in 1855, bequeathed (inter alia) as follows :—" I give and bequeath to my dear friend Mistress *Caroline Schenk* the sum of 1400*l.* sterling, invested in seventy shares of the *Madras* Railway, for her sole use and benefit; and, in the event of her death, then I give and bequeath the above-mentioned sum of 1400*l.* to her youngest surviving son."

At the date of the will, and at the hearing of the cause, the Plaintiff had three sons only, the youngest of whom was still an infant.

Mr. *J. Hinde Palmer* contended, that the Plaintiff was entitled absolutely to the *Madras* Railway shares mentioned in the will. The bequest was immediate, and the event contemplated by the testator, upon the happening of which the gift over was to take effect, was a death in his own lifetime.

[He referred to the cases cited on this subject by Mr. *Jarman*(a).]

Mr. *Bowring*, for the youngest surviving son, contended, that, according to the true construction of the will, the Plaintiff took a life interest only in the shares, with remainder to such of her sons as should be her youngest son at her decease. The event contemplated was death at any time, and not death in the lifetime of the testator. Very slight circumstances had been held sufficient to lead to this construction, both by Lord *Thurlow* and Lord *Loughborough*, in *Now*

March 27th
& 29th.

Will—Construction—
Death of Legatee—Bequest in Event of—Substitutional.

Bequest of a legacy to the Plaintiff for her sole use and benefit; "and, in the event of her death, then" bequest thereof to her youngest surviving son—
Held, that the event contemplated was a death in testator's lifetime; and that the Plaintiff, having survived him, was entitled absolutely.

Lord Douglas
v. Chalmers
(2 Ves. J. 501)
observed on.

(a) 2 Jarm. Wills, p. 626.

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lan v. Nelligan (a), and Lord Douglas v. Chalmer (b). And see the cases cited in 2 Jarm. Wills, pp. 627 et seq.

Mr. Giffard, for the executors.

Judgment reserved.

March 29th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Said, he had looked into the authorities, and had come to the conclusion, that, according to the true construction of the will, the Plaintiff was entitled to the railway shares in question, absolutely: the gift to her youngest son being a substitutional gift, intended to take effect in the event of her death in the lifetime of the testator. He found but one case which appeared at all to stand in the way of this construction, viz. *Lord Douglas v. Chalmer*, before Lord *Loughborough*. But that case must be considered to have been decided upon its own special circumstances, and appeared never to be cited except for the purpose of being distinguished.

Minute of
 Decree.

DECLARE, that the Plaintiff is absolutely entitled to the *Madras* Railway shares in the bill mentioned.

(a) 1 Br. C. C. 489.

(b) 2 Ves. jun. 501.

1858.

THE AUSTRALIAN STEAM SHIP COMPANY
(LIMITED) v. FLEMING.

May 27th.

THE Plaintiffs were a limited company within the meaning of "The Joint Stock Companies Act, 1857" (a).

The Plaintiffs were under voluntary winding up; and it appeared by a letter of the secretary that they had no funds to pay the premiums on the policies effected on their ships. Under these circumstances—

*Practice—
Limited Companies—20 &
21 Vict. c. 14;
s. 24—Security
for Costs—
40th Order of
3rd of April,
1828.*

Where a limited company was Plaintiff—held that a bond for 100*l.* was sufficient security for costs within the meaning of the Joint Stock Companies Act, 1857, s. 24.

The *Solicitor General*, on behalf of the Defendants, now moved for an order upon the Plaintiffs, under the 24th section of the Act (b), to give security for costs.

Mr. *Bagshawe*, jun., for the Plaintiffs, submitted to give the usual security provided by the 40th Order of the 3rd of April, 1828, for the case of a Plaintiff who is out of the jurisdiction of the Court, viz. a bond for 100*l.*, or to pay 120*l.* into Court.

The *Solicitor General*.—The Act says nothing about "usual security"—it says "sufficient security;" and in a heavy suit of this nature by a limited company in such

(a) 20 & 21 Vict. c. 14.

(b) The 24th sect. enacts—
"Where a limited company is Plaintiff or Pursuer in any action, suit, or other legal proceeding, any Judge having jurisdiction in the matter may, if it be proved to his satisfaction that there is

reason to believe that, if the Defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security be given."

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circumstances as here exist, the proposed security is clearly insufficient.

The rule by which 100*l.* was fixed is an arbitrary rule, adapted to the circumstances of times long since past, and differing materially from the present, and never contemplated the existence of companies with limited liability.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I must hold a bond for 100*l.* to be sufficient security within the meaning of the 24th section of the Act.

The Court has fixed that sum in the Order of 1828 as the sum for which a bond is to be given as a security to answer costs by a Plaintiff out of the jurisdiction of the Court, increasing it from 40*l.* at which it had been previously fixed. It has fixed upon 100*l.* not arbitrarily, but because it deemed that sum sufficient; not in times long gone by, but as recently as 1828.

The order will be, that the Plaintiffs give the usual security, viz. 120*l.* if paid into Court, 100*l.* if secured by bond.

The *Solicitor General* declined the bond of the company.

*Minute of
 Order.*

ORDER as above. Bond (if any) to be with one surety only.

1858.

BARROW v. BARROW.

June 5th, 7th,
& 23rd.

BY an indenture, dated 1834, being the settlement executed in contemplation of the marriage between the Plaintiff *Mary Barrow*, then an infant, and *Robert Barrow*, since deceased—*Robert Barrow* covenanted with trustees, named *Rolph* and *Hignell*, that he or the Plaintiff, or their heirs, should, within one month after the Plaintiff should attain the age of twenty-one years, at his own costs, surrender into the hands of the lord of the manor of *Thornbury* certain copyhold hereditaments, of which the Plaintiff was then tenant in tail, subject, as to part, to the life estate of her mother, *Mary Barton*, since deceased, to the use of *Rolph* and *Hignell*, their heirs and assigns, or to the use of one of them, his heirs and assigns, free from all estates tail, and all reversions and remainders therein expectant or dependant, to the intent that the trustees or one of them, their or his heirs, might, at the costs of *Robert Barrow*, be admitted tenants or tenant of the same, to hold upon trust to surrender the same to the use of the trustees or one of them, their or his heirs; and that, after such surrender and admittance, the trustees, or such of them as should be admitted, their or his heirs, should stand seised of the same hereditaments, subject to the life estate of *Mary Barton* in part thereof, upon trust, during the joint lives of the Plaintiff and *Robert Barrow*, to receive the rents, and to

Married Woman—Election by, as to real Property, without Deed acknowledged under 3 & 4 Will. 4, c. 74—Specific Performance—Decree for—Fraud—Settlement on Marriage of an Infant.

A married woman can elect so as to affect her interest in real property, without deed acknowledged under the Act 3 & 4 Will. 4, c. 74; and, where she has so elected, the Court can order a conveyance accordingly, the ground of such order being, that no married woman shall avail herself of fraud.

By ante-nuptial settlement, the intended husband covenant-

ed to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children of the marriage. The wife, having attained twenty-one, filed a bill by her next friend against her husband, and obtained a decree for specific performance of the covenant, with directions for raising the costs out of the estate; and, by virtue of the decree, she received, during the husband's lifetime, 50*l.* on account of rents, to her separate use. The husband dying a month after the decree—*held*, upon petition by the children, that these acts on the part of the wife amounted to an election, and that she was bound by the decree; and she was ordered to settle the premises accordingly.

Lassence v. Tierney (1 MacN. & Gor. 551), and *Field v. Moore* (19 Beav. 176; S. C., 2 Jur., N. S., 145), explained.

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pay the same as the Plaintiff should, notwithstanding her intended coverture, by writing under her hand direct, but without power of anticipation; and in default to the Plaintiff for her separate use; and after the decease of such of them the Plaintiff and *Robert Barrow* as should first die, in case the Plaintiff should survive, to permit her or her assigns to receive the said rents; but in case he should survive her, upon trust for him, until he should assign, charge, or otherwise incumber the premises; and after the decease of the Plaintiff and *Robert Barrow*, or his interest having ceased, in trust for the children of the marriage, as the Plaintiff should by deed or will appoint; and in default of appointment, in trust for all the children of the marriage who should attain twenty-one, or die under that age leaving issue living; with certain remainders over in case there should be no such child. The indenture contained a power for the Plaintiff and *Robert Barrow* to appoint new trustees.

There were six children of the marriage, five of whom were still infants.

The trustees named in the indenture retired; and in December, 1837, the petitioner *Thomas Barrow* and one *Sainsbury* were appointed trustees. *Sainsbury* died in 1841.

In September, 1854, the Plaintiff, who had then attained twenty-one, filed a bill by one *Foster* as her next friend, praying that *Robert Barrow* might be ordered specifically to perform the covenant on his part contained in the indenture of 1834; and to pay all fines and fees necessary to be paid in order to vest the lands then subject to the trusts of the indenture in the trustees thereof; that a trustee might be appointed in the place of *Sainsbury*; and for an account, and payment of the rents of the premises received by the Defendant *Robert Barrow* and the Petitioner *Thomas Barrow*.

The suit was prosecuted to a decree, and on the 4th of December, 1855, a decree was made, whereby *Foster* was appointed a trustee jointly with *Thomas Barrow* of the hereditaments comprised in the indenture of 1834; and it was ordered, that *Robert Barrow* should concur with the Plaintiff, at his own costs, in surrendering the premises to the use of *Thomas Barrow* and *Foster*, their heirs and assigns, to be held by them upon the trusts of the indenture; that *Thomas Barrow* and *Foster* should apply for and obtain admission to the premises; that *Robert Barrow* should pay the trustees' costs of such admission other than the fines which should become payable to the lord; that *Foster* should receive the rents and profits until admission, and pass his accounts and pay his balances to the Plaintiff for her separate use; that accounts should be taken of the rents of the premises accrued due since the said 19th of September, 1853, and received by *Robert Barrow* or by *Thomas Barrow*; and they were respectively ordered to pay to the Plaintiff for her separate use what should be found due from them respectively upon taking such accounts. Directions were then given as to costs: and it was ordered that the costs of the Plaintiff as between party and party, and the costs, charges, and expenses of *Thomas Barrow* and of the other Defendants, and the amount of the fines which should become payable on the admission of the trustees, should be raised by the trustees by sale of a sufficient part of the copyhold hereditaments, or by mortgage of the whole or a sufficient part thereof; and the Plaintiff and *Robert Barrow*, and all other necessary parties, were to concur in such sale or mortgage as the Court should direct; and out of the moneys to arise by the sale or mortgage the trustees were ordered to pay the fines payable by them on admission, and to pay the Plaintiff her costs as between party and party, and the other Defendants their costs, and costs, charges, and expenses.

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On the 1st of January, 1856, *Robert Barrow* died, having appointed *Robert Barrow* the younger (the eldest son of the marriage,) and another his executors. His will was proved by *Robert Barrow* the younger only; against whom, by the usual order, dated the 12th of January, 1857, the suit was duly revived.

In pursuance of the decree the Chief Clerk, in May, 1857, certified that there was a balance due from the estate of *Robert Barrow* of 162*l.* 2*s.* on account of rents; but that, *Robert* the younger not admitting assets, the Plaintiff had waived taking the accounts of the personal estate of the deceased; and that *Thomas Barrow* had not received any sum on account of rents since the 19th of September, 1853.

In further pursuance of the decree, the Taxing-Master, in November, 1857, certified that he had taxed the costs of the Plaintiff, as between party and party, at 251*l.* 3*s.* 4*d.*; and that the total amount of costs to be raised, pursuant to the decree, was 572*l.* 5*s.* 11*d.*, in addition to the amount of the fines thereby directed to be raised, which would be considerable.

The Petitioners, *Thomas Barrow* and *Foster*, not having been admitted tenants of the copyhold premises as directed by the decree, the former applied to the Plaintiff to concur with him in carrying the decree into effect; but the Plaintiff declined to take any further step in the suit, insisting that the settlement and decree were not binding upon her, inasmuch as she was under disability when those proceedings were had, and that she was now entitled to the property as her own, free from the settlement and decree.

Under these circumstances, a petition was presented by *Thomas Barrow* and the infant children, to have the decree carried into effect.

It appeared, that, by virtue of the decree, the Plaintiff had received from *Foster*, during her husband's lifetime, the sum of 50*l.*, on account of the rents of the hereditaments in question, for her separate use.

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It was suggested, that, by the custom of the manor, only one person at a time could be admitted tenant of the same tenement.

Mr. *Rolt*, Q. C., and Mr. *Bagshawe*, jun., for the petitioners, contended, that the Plaintiff was bound by the decree, although made during her coverture; and asked that she might be ordered to concur in settling the property upon the trusts of the indenture of 1834, subject to the costs and fines by the decree directed to be raised.

Argument.

A married woman is competent to elect: See Mr. *Jacob's* note to *Roper's* "Husband and Wife" (a). In a suit by her next friend she can bind her property by a compromise: *Wilton v. Hill* (b).

[The VICE-CHANCELLOR referred to *Bateman v. The Countess of Ross* (c) as an authority that a married woman, being in litigation and at arm's length with her husband, can be bound by her own agreement to submit the matters in dispute between them to arbitration.]

And in this case the suit instituted by the wife by her next friend against her husband, and the decree she has obtained in favour of her separate use and adverse to her husband's marital right, amount to an election. A feme covert is as much bound by a decree as a feme sole: *Burke*

(a) Vol. i. p. 28; also Bright's
Husb. & Wife, vol. i. p. 158,
ii. p. 473.

(b) 25 Law J., N. S., Ch., 156.
(c) 1 Dow, 235, cited in *Vansittart v. Vansittart*, sup., pp. 71—73.

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v. *Crosbie* (a). And here the Plaintiff has not only obtained a decree, but has received benefits under it, which but for that decree would not have been her's.

Besides, since her husband's death, she has obtained an order to revive the suit against his personal representative, and that circumstance must amount to a confirmation of what was done by her during her coverture.

[They cited also *Wayke* v. *Parker* (b), *Derbshire* v. *Holme* (c), *Mallack* v. *Galton* (d), and *Jordan* v. *Jones* (e).]

Mr. *James*, Q. C., and Mr. *Stiffe*, for the Plaintiff, contended that she was not bound by the decree; and that the order asked could not be made.

Notwithstanding the suit and decree and the proceedings thereunder, and notwithstanding even the obtaining of the order of revivor and supplement after her husband's death, the Plaintiff is now tenant in tail of the property, and entitled to deal with it as she may think fit. The settlement made by her when she was an infant was void as to her real estate, and the filing a bill by her as a feme covert, and even obtaining a decree for enforcing her husband's concurrence in the settlement, were inoperative to bind the estate as against her surviving: *Lassence* v. *Tierney* (f), *Field* v. *Moore* (g), *Savill* v. *Savill* (h).

The VICE-CHANCELLOR. — In *Lassence* v. *Tierney*, I think, there had been no decree.

Mr. *James*.—But in *Field* v. *Moore* there had. And the

(a) 1 Ball & Beatt. 502.
 (b) 2 Kee. 59.
 (c) 3 D. M. G. 102.
 (d) 3 P. Wms 352.
 (e) 2 Phill. 170.

(f) 1 M'N. & Gor. 551.
 (g) 19 Beav. 176; S. C., affirmed on appeal, 2 Jur., N. S., 145.
 (h) 2 Coll. 721.

principle of both decisions was, that this Court has no power to bind real estate of a married woman, except by the formalities prescribed by law for that purpose: *Field v. Moore* (a). Both principle and authority concur in showing, that, where these formalities have been omitted,—where a deed has not been acknowledged, this Court cannot supply the omission. To hold otherwise, would destroy the protection which the law throws around married women: *Lassence v. Tierney*.

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Here there has been no deed acknowledged; and if the Court should hold the Plaintiff to be bound by the settlement, upon the mere ground that a decree has been made for carrying that settlement into effect, it would disturb the whole law in reference to the alienation of land by *femes covert*, and in future any married woman could be compelled by her husband to sell her lands, without the power of exercising her own will in the matter.

The VICE-CHANCELLOR.—Do you deny that a married woman may elect so as to bind her real estate? In *Ardesoife v. Bennet* (b), a married woman was held to have elected between real estate and a legacy of greater value, from the mere circumstance of her having received for five years the interest of the legacy; and on that ground her heir was held to be bound.

Mr. James.—If that case is correctly reported, it cannot be reconciled with *Lassence v. Tierney* or *Field v. Moore*.

The VICE-CHANCELLOR.—It is a case cited in every text book I have ever seen on the subject of election.

Mr. James.—It is in conflict with the later decisions

(a) 19 Beav. 176.

(b) 2 Dick. 463.

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cited; and the recent case of *Campbell v. Ingilby* (a) must be considered as having overruled it.

Then, as to the obtaining of the order of revivor and supplement after the husband's death, and the prosecuting the accounts against his estate, those circumstances cannot have the effect of confirming what was done by the Plaintiff during her coverture. She has derived no benefit from them, and they were not steps taken with intent to confirm, or with any notice on her part that she had the power to repudiate the settlement.

Mr. *Cracknall*, for *Robert Barrow* the younger, the alleged heir in tail of the copyhold property, claimed to be heard against the petition, costs being thereby asked against him as personal representative of his deceased father:—

It is clear, that the infant Petitioners could not have maintained this bill against their parents: *Borton v. Borton* (b), where a precisely similar bill by children was dismissed. The present case is new, but must be determined on the principle on which the Court proceeds in reference to a wife's equity to a settlement, viz. that the equity is a right personal to the wife—a right which she need not enforce, which she can waive at any time before a settlement is actually executed, notwithstanding an order referring it to the Master to approve of a settlement, and a settlement approved of accordingly: *Baldwin v. Baldwin* (c); and which if once waived by her the interest of her children is defeated, their right being dependent altogether upon the will of their mother: per Lord *Eldon*, in *Murray v. Lord Elbank* (d); also *Lloyd v. Williams* (e), *De La Garde v.*

(a) 1 De G. & Jones, 393.

(b) 16 Sim. 552.

(c) 5 De G. & Sm. 319.

(d) 10 Ves. 91; *S. C.*, 1 Lead.

Ca. in Eq. 298, and notes.

(e) 1 Madd. 450. Where, how-

Lempriere (a), *Baker v. Bayldon* (b), and *Fenner v. Taylor* (c).

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Mr. Rolt, Q. C., in reply:—

The question is not, as in *Lassence v. Tierney* and *Field v. Moore*, whether the land is bound, but whether the conscience of the Plaintiff is affected. After what she has done in the suit, it would be a fraud if the Plaintiff could escape from the decree she has obtained. At all events, her life-estate should be sequestrated.

The VICE-CHANCELLOR.—The question comes to this, whether equity can fasten upon the conscience of a married woman; and if so, to what extent? It has occurred to me, whether I cannot at least fasten upon the Plaintiff so much of the decree as orders her to concur in raising the costs—for instance, by a sale or mortgage of the property; also whether, as she has got a decree, the Court cannot put her upon getting rid of it: and if she has to come here for that purpose, then I shall have a right to say upon what terms that shall be allowed. But I shall not dispose of any part of the case without taking time to consider it.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD—after stating the facts of the case, proceeded as follows:—

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The sole question before me is, whether the Plaintiff is bound by the decree she has obtained?

ever, what was held was, that a tlement in the lifetime of the child has no equity to insist on mother."
a settlement, "unless there be a (a) 6 Beav. 344.
contract or a decree for a set- (b) 8 Hare, 210.
(c) 2 Russ. & M. 190.

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It was argued that the Court could not hold her to be bound by that decree without in effect disturbing the whole law with reference to the alienation of land by married women, and destroying the safeguards which the law throws around them in the enjoyment of that description of property, inasmuch as to hold her to be bound by the decree would be in effect to hold that a married woman can part with her interest in land without complying with those formalities, which, for the protection of married women, the law has required to be performed, and has made indispensable, for the purpose of a valid alienation. That contention was raised upon the authority of *Lassence v. Tierney*(a), but chiefly upon that of *Field v. Moore*(b); and the inference drawn from those authorities was, that the Plaintiff in this case is to hold herself entirely free from all the proceedings had in her suit, from the decree she has obtained, and the benefits she has received under that decree; that all these are to go for nothing, and she is to be held as free as if no suit had been instituted.

It appeared to me during the argument that this was a very startling contention. I have since had an opportunity of examining the authorities upon which it professed to be founded, and I do not find that they justify any such proposition.

With regard to *Field v. Moore*, all that was there decided amounted to no more than this—an infant ward of court had been married under circumstances which evinced, as the Court considered, the grossest moral culpability on the part of the husband, and the Court, in the discharge of its duty towards her, made a decree amounting in effect to this, that her husband should never become interested in any part of her estate, but the whole should be settled upon trusts for her

(a) 1 M'N. & Gor. 551. (b) 19 Beav. 176; S. C., 2 Jur., N.S., 145.

separate use, with a power for her, in default of issue, to appoint by will. It was not, like this, a case of contract by the husband, of which the wife came here to enforce specific performance. The decree originated entirely with the Court. The Court, for the protection of its ward and to deprive her husband of what he would otherwise have taken, ordered the settlement to be executed. It is true, she executed the settlement prepared in pursuance of that decree; but, before it had been acknowledged by her as required by the Act, she died. All that she had done merely showed a readiness on her part to complete the settlement, but she had not in fact completed it as required by the statute; and the Court held, as between her heir at law and the devisee under her will, that the heir at law was not bound. The case in this respect was the simple case of an intention, partially performed, to bar an entail, where, the transaction not being completed as required by the Act, the issue in tail are held to be unaffected—certainly it does not support the inference drawn from it in the argument.

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On the contrary, there is abundant authority to show that this Court can and does deal with the interests of married women where there is an equity by which their consciences can be affected. A married woman can elect so as to affect her interest in real property without a deed acknowledged for that purpose. And where she has not already elected, the Court can order her to signify her election. It was said, that a married woman could not elect so as to bind her real estate; but *Ardesoife v. Bennet* shows the contrary; and that case was followed by others referred to in Mr. *Swanston's* note to *Gretton v. Haward*(a), which establish that she can elect so as to affect her interest in real property; and that, where she has once so elected, though without deed acknowledged, the Court can order a

(a) 1 Swanst. 413—416.

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conveyance accordingly;—the ground of such order being, that no married woman shall avail herself of fraud. Having elected, she is bound, and the transaction will be enforced against the heir.

Another case, in which this principle was acted upon, is that of *Savage v. Foster*(a). There a married woman, tenant in tail of lands, had allowed a purchaser to deal with them as his own, without giving notice of her title; and upon the ground that it was a fraud on her part not to give notice of her title, the Court decreed a conveyance, to extinguish her right to the lands.

It is important to look at the decree in that case, because some of Lord *Eldon's* observations upon it in the case of *Jackson v. Hobhouse*(b) are incorrectly reported. The decree was, that the Defendant, the married woman, should levy a fine to the Plaintiff, the purchaser, to extinguish her right to the lands in the settlement; that the Plaintiff should have a perpetual injunction to quiet his possession; and that, if the Defendant should levy the fine quietly and without delay, then the Plaintiff should have no costs, otherwise, the Defendant should pay costs. The report says *the Plaintiff* should pay costs, but that must be an error. The object of the order being, apparently, to enforce speedy performance of the decree by that direction as to costs.

That case is referred to in *Jackson v. Hobhouse*, both by Sir *John Leach*, who was then at the bar, and by Lord *Eldon*, and both are erroneously represented in the report as having described it as not applying, because it was “a case of a power.” That clearly must be wrong, for it was not a case of a power, but of an estate tail. What they must have said is, that *Savage v. Foster* did not apply, be-

(a) 9 Mod. 35.

(b) 2 Mer. 483.

cause it was a case of a married woman having a power to convey—that is, by a fine.

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In *Jackson v. Hobhouse*, the wife, entitled for life to her separate use, with a proviso against anticipation, had assigned her future interest to secure an annuity, which the Plaintiff as surety for her husband had joined in a covenant to pay; the Plaintiff alleged that the proviso had been fraudulently concealed from him when he entered into the covenant, and charged her with being guilty of fraud in having been privy to such concealment. Lord *Eldon* said, that, even if the fraud had been established, he was inclined to think the Court would not suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. Then, alluding to *Savage v. Foster*, and *Watts v. Creswell*(a), where the fraud was that of an infant, he says this:—"In the cases referred to, of a married woman having a power" (that should be, "having power to convey" i. e. by fine), "and of an infant, they are capable by law of conveying, the act of the latter being only voidable on his attaining full age. But the present case is different, the married woman having no power to make a conveyance; if, therefore, the fact of fraud were fully established, it would be difficult to make out the inference attempted to be derived from those cases." He had said, in an earlier passage of his judgment: "Supposing the omission to be clearly the wife's personal fraud, the question has reference not only to her interest, but to the intention of the author of the settlement, and it becomes a very material point to determine whether the Court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor."

In that case, therefore, *Savage v. Foster* is recognised, but distinguished on the ground that there the wife had power to

(a) 9 Vin. Abr. 415.

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convey under the settlement creating the entail; whereas, in *Jackson v. Hobhouse*, such a power was expressly negatived by the settlement.

And it seems to me, that it would go to the root of the whole jurisdiction as to fraud, if in this case I were to allow the Plaintiff to retain the benefit she has derived under the decree, and yet to decline to be bound on her part by proceedings in which, under a different state of circumstances, she had embarked, speculating on the chance of her husband's life.

In *Field v. Moore* I find nothing contrary to this view. I find Lord Justice *Turner* recognising the law as acted upon in *Ardesoife v. Bennet*. He examines a vast number of cases, and proceeds thus:—"But all these cases were either cases in which the Court enforced a right which was paramount to that of the married woman, or a right which the married woman herself had duly created; or they were cases of election, in which the interests of third persons were concerned. Cases of the first class are wholly different from those of settlements made by the Court upon the marriage of its infant wards. In the cases of such settlements, there is no paramount right; there can be no right duly created by the ward; but the Court acts merely with a view to the benefit of its ward: and the cases of election are equally inapplicable to a case like the present. If, upon the marriage of the ward, a settlement was made by the husband, it is possible that some case of election might arise, as in the case of *Savill v. Savill*; but in this case there was no settlement by the husband, the marriage was a gross contempt of Court. The Court deprived the husband of the interest which he took by the marriage in the real estates of the wife, and settled that interest for the benefit of the wife; and the act of the Court in depriving the husband of his interest certainly could not be made the foundation of a case of election against the wife."

The case before me is entirely different. This is not the act of the Court. This is not a settlement ordered at the instance of the Court: it is the case of a covenant, of which the Court has decreed specific performance at the instance of the wife, who throughout has been the acting party. It is quite true, there was no need for her to ask to have the covenant performed; but if she chose to have it performed, she could not divide it—she could not have it performed in part only. The covenant was one and entire, to settle the property upon her for life, with remainder to her husband for life, with remainder to the children. She could not call upon her husband to perform it so far as to give her the first life estate, but to settle nothing in remainder on himself or on his children. His own life estate in remainder, and the remainder to his children, formed the benefits in consideration of which he covenanted to settle the property, and to forego that interest in the rents which the law gave him in right of his wife.

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That being so, the wife being perfectly free to elect whether she would or would not have the covenant performed, through her next friend, simply as a feme sole, elects to have it performed, files her bill, and obtains a decree for specific performance of the covenant; and by virtue of that decree puts into her own pocket what, upon any other footing, was her husband's property. Those acts, all done by her during coverture (I do not rely at all upon the revival of the suit by her after she became a widow), amount clearly to an election; and, after that election, how can I say she is not to be bound by the proceedings she has taken, simply because, in the event that happened—by the death of her husband within a few days after the decree—the interest she elected to take proved less beneficial than that to which she would have been entitled independently of her husband's covenant?

Mr. *Cracknall* argued that the case resembled cases of

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the wife's equity to a settlement,—where, although children always take benefits under the settlement which the Court orders at the suit of the wife, the equity is treated by the Court as one personal to the wife, which the wife alone can enforce, and which if waived by her, the interest of the children is defeated. But I see no analogy between the cases. This is not a case of equity to a settlement. It is a case of a covenant whole and indivisible, of which she has asked specific performance, entire and as it stands. Besides, in the cases on the wife's equity to a settlement (I have looked carefully through them all), the Court allows the wife to retire after reference for a settlement, and after a settlement so approved has been approved of by the Master, but not after a settlement has been finally ordered. Here the decree has been made, and the Plaintiff comes too late.

It appears to me, that, in this case, the Plaintiff is clearly bound to carry the settlement into effect; and if the lord will not admit two trustees, one must be admitted alone.

I should have said, with reference to *Lassence v. Tierney*, that in that case there was merely a bill filed, and no further proceedings were had; and it was on that ground the case was disposed of.

There will be a declaration, that the Plaintiff is bound by the decree in the petition mentioned, and she will be ordered to concur with all proper parties in surrendering the copyhold hereditaments in the indenture of 1834, and in the decree mentioned, to the trustees, or one of them, so as to raise the costs and fines directed to be raised by the decree, and subject thereto upon the trusts declared by that indenture.

Ordered accordingly.

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LISTER v. LEATHER.

July 2nd.

THIS suit was instituted against the Defendant for infringing the Plaintiff's letters patent. The Plaintiff obtained an interim injunction, and his right had been since established in an action at law. Upon the cause now coming on to be heard, the Court was of opinion that the Plaintiff was entitled to his full costs, charges, and expenses, taxed as between solicitor and client; but a question arose whether the decree should contain an express direction for the Taxing-master so to tax the same.

Patent—15 & 16 Vict. c. 83, s. 43—Costs—Costs as between Solicitor & Client—Form of Order.

In a suit for the infringement of a patent, where the Court considers the Plaintiff entitled to full costs as between solicitor and client, the decree or order should contain an express direction, that the costs be so taxed, notwithstanding the 43rd section of the Patent Law Amendment Act, 1852, provides that he shall have such full costs, unless the Judge shall certify that he ought not to have them.

Mr. Fooks, for the Plaintiff.

Mr. James, Q. C., and Mr. Fischer, for the Defendant, submitted, that, under the 43rd section of the Patent Law Amendment Act, 1852(a), such a direction was unnecessary. Upon a simple order to tax the Plaintiff's costs, the Taxing-master would tax him his full costs, unless the Judge should certify that he ought not to have such full costs.

The VICE-CHANCELLOR held, that, notwithstanding the words of the Act, the decree ought to contain an express direction for the Taxing-master to tax the Plaintiff's costs as between solicitor and client;—the practice of this Court, in all other suits, being to tax costs as between party and party, in the absence of special directions to the contrary.

(a) 15 & 16 Vict. c. 83. By this section, the record and certificate being given in evidence shall entitle the Plaintiff, on obtaining a decree or decretal order, to his full costs, charges, and expenses, taxed as between attorney and client, unless the Judge making such decree or order shall certify that the Plaintiff ought not to have such full costs.

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June 30th &
July 1st.Will—Con-
struction—
"Moneys."

The word "moneys" in a codicil—held, to comprise not only all moneys in hand, but also all moneys due to testator, whether upon security or otherwise, notwithstanding express mention made in the will of "moneys and securities for money."

LANGDALE v. WHITFIELD.

BY an indenture, dated 1844, being the settlement made in contemplation of the marriage of *Thomas Haire* and *Mary Ann* his wife, certain real and personal property mentioned in the schedules thereto was settled upon trust for *Mary Ann* for life for her separate use, remainder for *Thomas Haire* for life, remainder, in default of issue of the marriage, upon trust for such person or persons and for such estates and interests as *Mary Ann*, notwithstanding her coverture, should by will appoint, and in default of appointment to her next of kin under the statutes of distribution exclusively of *Thomas Haire*.

Mary Ann made her will in 1845; and thereby, after reciting the settlement, and that the trustees thereof were to stand possessed of the mortgage debts and sums of money, bonds, bills, notes, securities, produce of the sale of the messuage, and all other the property and effects comprised in the schedules annexed to the indenture of settlement, in default of issue of the marriage and subject to a life interest therein of her husband, upon trusts for such persons, intents, and purposes, as she, notwithstanding her coverture, should by her will give and bequeath the same, she, in exercise and execution of the power to her given by the settlement, and all other powers enabling her, in default of such issue, and subject and without prejudice to the interest of her said husband therein, gave and bequeathed all and singular the said trust moneys, property, and other her personal estate in manner thereafter mentioned. She then proceeded to give pecuniary legacies to various persons and to different charities, and directed the whole of such legacies to be paid within twelve calendar months next after the decease of the

survivor of her husband and herself. Amongst the legacies so bequeathed were a legacy of 500*l.* to *Robert Thomson*, to be paid to him if, and when, and so soon after the period before mentioned as, he should attain the age of twenty-one years; two legacies, of 100*l.* each, to her god-daughters, the Defendants, *Mary Burnet* and *Florence King*, to be paid in like manner, if and when they should respectively attain twenty-one years; and a legacy of 100*l.* to her cook *Maria Ford*: and after giving certain specific legacies of furniture, plate, coins, pictures, books, wearing apparel, and trinkets, she proceeded as follows:—"And as to all the residue of my moneys, securities for money, goods, chattels, effects, and personal estate, not by me hereinbefore otherwise disposed of, I give the same to my friend, *Mary Ann Langdale*," meaning the Plaintiff.

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 ———
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 v.
 WHITFIELD.
 ———
Statement.

By a codicil to her will, dated August, 1849, the testatrix, after reciting the bequest by her will to *Thomson* of the legacy of 500*l.*, and to *Mary Burnet* and *Florence King* of the legacies of 100*l.* each, and to *Maria Ford* of the legacy of 100*l.*, payable at the times and in the manner in the will mentioned, she revoked the same legacy of 500*l.* to *Thomson*, and the said legacies of 100*l.* a piece to *Mary Burnet* and *Florence King*, and gave to *Thomson* the sum of 300*l.* And she thereby directed, that, as well the last-mentioned legacy to *Thomson*, as the said legacy to *Maria Ford*, should be paid to the said legatees respectively "out of any moneys of or to which she might be possessed or entitled at the time of her decease, and within twelve calendar months next after such decease." She then proceeded as follows: "And I do hereby give all the residue of the moneys of which I may at the time of my decease be absolutely possessed, unto and equally between the said *Mary Burnet* and *Florence King*, their executors, administrators, and assigns, abso-

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lutely, share and share alike; and in all other respects I ratify and confirm my said will."

The personal estate of the testatrix, at the time of her decease, consisted—

First. Of property subject to the trusts of the settlement, amounting to about 7700*l.*, of which her husband was entitled, under the trusts of the settlement, to the interest and dividends during his life.

Secondly. Of mortgage debts, bonds, bills, notes, cash in the house and cash at the banker's, arising from the savings out of her income under the settlement, amounting to about 2838*l.* 1*s.* 8*d.*; and of a sum of about 300*l.*, being arrears of rent and interest due to her at her decease in respect of her settled property and private securities, making together 3138*l.* 1*s.* 8*d.*

Thirdly. Of various household furniture, plate, linen, books, and other chattels.

The Plaintiff, by her bill, admitted that the Defendants, *Mary Burnet* and *Florence King*, were entitled to the residue of the money of the testatrix at her house and at her banker's at the time of her death, which might remain after the payment thereof of the testatrix's debts, funeral and testamentary expenses, and the legacies of 300*l.* and 100*l.* mentioned in the codicil; but prayed that it might be declared that the Plaintiff was entitled to the remainder of the residuary personal estate of the testatrix, and for payment of the same accordingly.

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Mr. *Willcock* and Mr. *Springall Thompson*, for the Plaintiff, contended, that the bequest in the codicil to the testatrix's god-daughters, *Mary Burnet* and *Florence King*, of "all the residue of the moneys of which she might at

the time of her decease be absolutely possessed," must be confined to moneys actually in hand and cash to her drawing account at her banker's.

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Primâ facie, a bequest of "all my moneys" was always restricted to ready money as distinguished from money due to a testator: *Lowe v. Thomas*(a). And here, not only was there nothing in the context to justify the Court in construing the word "moneys" so as to include debts and securities for money, but that construction was expressly negatived by the testatrix, who, in her will, had treated securities for money as distinct from moneys, by the words "and as to all the residue of my *moneys, securities for money*, goods, chattels, effects, and personal estate."

[They cited also *Manning v. Purcell*(b), *Vaisey v. Reynolds*(c), *Barrett v. Knight*(d), and *Larner v. Larner*(e).

Mr. Rolt, Q. C., and Mr. Hislop Clarke, for the Defendant *Florence King*; and

Mr. Daniel, Q. C., and Mr. Hobhouse, for the Defendant *Mary Burnet*—

Claimed everything over which the testatrix had a power of appointment, or, at all events, all moneys actually in hand at the time of the testatrix's decease, and all moneys due to her on security or otherwise.

Whatever is available under the codicil for payment of the legacies to *Thomson* and *Maria Ford*, the residue of that must go to the god-daughters, upon the principle of the decisions in *Rogers v. Thomas*(f) and *Dowson v.*

(a) Kay, 369; S. C., affirmed on appeal, 5 D. M. G. 315.

(b) 2 Sm. & Giff. 284; S. C., 7 D. M. G. 55.

(c) 5 Russ. 12.

(d) 3 W. R. 579.

(e) 5 Id. 513.

(f) 2 Kee. 8.

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Gaskoin(a). And what is so available is all the "moneys of or to which the testatrix might be possessed *or entitled* at the time of her decease." It is admitted, that the word "moneys" may include debts, where the context requires it; and having regard to the context and the general scheme of the codicil, the Court will, in this case, adopt the larger interpretation of the word 'moneys,' as in *Glendenning v. Glendenning*(b).

Mr. James, Q. C., and Mr. Renshaw, appeared for the executors.

Mr. Willcock, Q. C., confined his reply to the question, how far the codicil affected the absolute property of the testatrix? the Vice-Chancellor having intimated his opinion, that it clearly could not affect any property over which she had merely a power of appointment.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Upon the first point in this case, viz. how far the codicil affects property over which the testatrix had only a power of appointment, I find no difficulty whatever.

The testatrix having a power, in default of issue, to appoint by will very large trust property, which she refers to at the commencement of her will, as consisting of "mortgage debts and sums of money, bonds, bills, notes, securities, produce of the sale of a messuage, and all other the property and effects comprised in the schedule to her marriage settlement," subject to her husband's life interest therein, deals with it thus by her will:—She recites, that she has this power, and then, in exercise of that and all other powers, in default of issue, and subject to her husband's life interest, she gives and bequeaths "all and sin-

(a) 2 Kee. 14.

(b) 9 Beav. 324.

gular the said trust moneys, property, and other her personal estate, in manner following." That would, of course, include everything, as well property which she had power to appoint by will as her own absolute property. She then gives certain legacies, of no very large amount, to be paid within twelve calendar months after the decease of the survivor of her husband and herself, including a legacy of 500*l.* to *Thomson*, and two legacies, of 100*l.* each, to her god-daughters, and a legacy of 100*l.* to one *Maria Ford*. And after bequeathing certain specific legacies, she proceeds as follows:—"And as to all the residue of my moneys, securities for money, goods, chattels, effects, and personal estate, not by me hereinbefore otherwise disposed of, I give the same to my friend *Mary Ann Langdale*," meaning the Plaintiff, "absolutely." Of course, making the Plaintiff residuary legatee of everything she had power to dispose of by will, whether comprised in the settlement or not.

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That being the effect of her will, by her codicil, after reciting the bequest by her will to *Thomson* of 500*l.*, and to her god-daughters of 100*l.* each, and to *Maria Ford* of 100*l.*, she revokes distinctly the legacy of 500*l.* to *Thomson*, and the legacies of 100*l.* a-piece to her god-daughters; and having made those revocations, she gives *Thomson* 300*l.* instead of 500*l.*, but makes no substitution in the case of her god-daughters beyond what I am about to mention. She then directs, that, as well the legacy of 300*l.* to *Thomson*, as the legacy of 100*l.* to *Maria Ford*, should be paid to the said legatees respectively out of any moneys of or to which she might be possessed or entitled at the time of her decease, and within twelve calendar months next after such decease. And she then proceeds thus:—"And I do hereby give all the residue of the moneys of which I may at the time of my decease be absolutely possessed, unto and equally between the said *Mary Burnet* and *Florence King*, their executors, administrators, and assigns, abso-

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lutely, share and share alike; and in all other respects I ratify and confirm my said will."

Now, the first observation that occurs upon that is, that the testatrix clearly makes a distinction between property of which she has power, under the settlement, to make an appointment to take effect upon the decease of her husband, and property of which she can make a bequest to take effect immediately after her own decease. And it is clear, that, under the word "moneys" in the codicil, she does not include any portion of the settled fund.

It is also clear, that there is in the codicil a plain revocation, to a certain extent, of the gift by her will of the residue in favour of the Plaintiff. The only question of any difficulty is how far that revocation extends. In other words, what construction I am to put upon the word "moneys" occurring in the codicil.

Now, the authorities have clearly settled, that, *primâ facie*, and in the absence of anything in the will to indicate a different intention, the word "moneys" will be confined to ready money actually in hand. A different intention may be gathered from the words of the will, and where that is the case, effect will be given to it. And, accordingly, in *Parker v. Marchant* (a), the expression "ready money" was construed, upon the whole of the will, to include the testator's balance at his banker's. And in *Manning v. Purcell* (b), where the testator had made a distinction in his will between all his moneys and certain articles specifically bequeathed on the one hand, and all the residue and remainder of his estate and effects on the other, sums standing to his credit at his banker's, one upon an ordinary account current and the other secured by deposit notes bearing interest, were held to pass under the words "all my

(a) 1 Phill. 356.

(b) 7 D. M. G. 55.

moneys." In *Lowe v. Thomas*(a), I found nothing in the will to indicate an intention to pass anything beyond money actually in hand, or, at any rate, beyond money in hand or at the banker's; and, accordingly, I felt bound to decide, that, under the words "the whole of my money," stock in the funds did not pass; and my decision was affirmed by the Lords Justices (b).

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The question here is, whether the word "moneys" can be held to comprise not only moneys actually in hand, but moneys due to the testatrix, whether upon the security of the mortgages, bonds, bills, and notes mentioned in the will, or otherwise.

Now, looking to the whole of the codicil, it is clear that the primary scope of it is to accelerate the enjoyment of what the legatees are to take; and, as regards her god-daughters, it is clear the testatrix had no intention to deprive them of anything they would have taken under the will without giving them what in any case would be at least an equivalent. Whereas, under the will, all the legatees would have had to wait for the legacies given them by the will until the expiration of twelve months after the decease of her husband, the primary object of the testatrix in the codicil is to accelerate the enjoyment of what she gives them by the codicil, and to provide that they shall take that benefit within twelve months after her own decease, and without waiting for the decease of her husband. That being the primary object of the codicil, one would be surprised to find other words in the codicil indicative of an intention on the part of the testatrix, that the whole object she had so in view should be left to depend for its accomplishment or failure upon the mere accident, whether at the time of her decease the cash in her own purse or at her banker's would be sufficient to carry her purpose into effect.

(a) Kay, 369.

(b) 5 D. M. G. 315.

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Then, again, the funds out of which the legacies to *Thomson* and *Maria Ford* are to be paid, are not described as moneys simply, or moneys of which the testatrix might be possessed, but as "moneys of or to which she might be entitled." It is admitted, that, although the primary meaning of the word "moneys," taken alone, is 'ready money' in its strict sense, still, like the words "child," "son," and many others, it is capable of expansion, where the context requires it to be construed in a wider sense, in order to effectuate the intention of the testator—we constantly hear people talking of having so much "money at their banker's," as Lord Justice *Turner* observes in *Manning v. Purcell* (a), or so much money "on bond," "on notes," or the like,—and it appears to me that the expression "or entitled" is an important circumstance in favour of the contention that the testatrix intended to use the word "moneys" in its larger signification.

Further, I have the circumstance, that the legacies to *Thomson* and *Maria Ford* are to be paid "within twelve calendar months next after the testatrix's decease." And although it is true, that, in the absence of any such direction, twelve months are always allowed to executors to ascertain what debts are owing by the deceased, still, that direction may be taken as implying an anticipation on the part of the testatrix that the funds out of which these legacies were to be paid might take time to realise.

But, without relying on this latter circumstance, finding, as I do, that the primary object of this codicil was acceleration, and that the testatrix has described the fund which she had in contemplation as "moneys of or to which she might be possessed or entitled," I think I am authorised in holding that the word "moneys" in the codicil was intended by the testatrix to include not only all moneys ac-

(a) 7 D. M. G. 67.

tually in hand, but also all moneys due to her at the time of her decease.

The other construction contended for would lead to the absurd consequence, that the question, whether the intended benefit would be accelerated or not, would depend upon the accident of the requisite funds being actually in hand or at her banker's at the time of the testatrix's decease, there being no conceivable object to be attained by leaving it so dependent.

It is true, that, if in describing the funds out of which the legacies to *Thomson* and *Maria Ford* are to be paid the testatrix had simply said "out of any moneys of which I may *be possessed*," omitting the words "or entitled to," the case would not have been so strong in favour of the Defendants' contention; but I cannot, on that ground, draw a distinction between the fund out of which she has given their legacies, and that which she has in view, when she speaks in the next sentence of "all the residue of the moneys of which she may at the time of her decease *be absolutely possessed*," without adopting a construction which would result in an absurdity.

The only further difficulty in the way of adopting a construction which includes in the term "moneys" not merely moneys in hand but securities for money, arises from the circumstance that the testatrix, in making her will, has treated the two as distinct, in the words "and as to all the residue of my *moneys, securities for money*, goods, chattels, effects, and personal estate;" whereas in the codicil she has spoken of moneys, without mentioning securities for money—an omission which, it was argued, must have been intentional, since the will shows that she knew the distinction between the two descriptions of property. But I read the two instruments thus:—In the will, delibe-

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rately drawn by a draughtsman, the several descriptions of property which the testatrix had in contemplation are separately enumerated; in the codicil, drawn under different circumstances, and as a supplement to the will, the enumeration is naturally more brief.

In the other authorities cited (*a*), there was not, as here, a gift of legacies out of a demonstrated fund, but a gift of legacies generally, and then a gift of all the residue of the testatrix's moneys; and as legacies given generally would, of course, be a charge upon the general estate, the residuary personalty was held to pass under the term "moneys" (*b*). But the same principle would apply here to pass the residue of the demonstrated fund, out of which the legacies are given by the codicil.

Mr. Daniel.—Your Honour does not consider any furniture to have passed by the bequest to the god-daughters?

The VICE-CHANCELLOR.—No. I expressly exclude furniture, and everything except "moneys," in the larger acceptation of the term—moneys in hand and moneys due.

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DECLARE, that the legacy of 300*l.* given by the codicil to *Thomson*, and the legacy of 100*l.* in the codicil mentioned, are payable out of all moneys of or to which the testatrix was possessed or entitled at the time of her decease, whether the same consisted of moneys actually in hand, or of moneys due to her on security or otherwise; and that the Defendants, *Mary Burnet* and *Florence King*, are entitled to the residue of the same moneys, but not to any portion of the settled fund.

(*a*) *Rogers v. Thomas*, 2 Kee. (*b*) See Lord Justice *Turner* in 8; and *Dowson v. Gashoin*, Id. 14. *Lowe v. Thomas*, 5 D. M. G. 319.

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USTICKE v. PETERS.

June 28th.

SIR *Michael Nowell* was, at the date of his will and at his death, seised in fee of certain freehold lands and hereditaments, and was tenant and absolute owner, subject as hereinafter mentioned, of certain lands and hereditaments, parcel of the ancient Duchy of *Cornwall*, governed by the custom of that duchy, and commonly called "Duchy lands," but sometimes called copyhold or customary lands. These Duchy lands were known and situate as follows:—*Menhay*, *Trewennack*, *Medlyn*, and *Gweal Hellis*, in the parish of *Wendron*, and *Pennenna* in the parish of *Stithiano*, all in the county of *Cornwall*.

Duchy of Cornwall—Surrender to Use of Will—55 Geo. 3, c. 192—Will—General Devise.

Lands, parcel of the Duchy of Cornwall, and governed by the custom of that duchy,—the tenure of which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years, under penalty

The tenure of these Duchy lands was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant, and his heirs and assigns, subject to the payment of a fixed fine every seven years, upon penalty of forfeiture on non-payment of the fine for a certain period, and after certain steps taken in

of forfeiture, no surrender to the uses of a will being required—*Held*, to pass by a general devise made previously to the Act 55 Geo. 3, c. 192. And the circumstance of such general devise being followed by a devise of all testator's Duchy lands to one for life—*Held* not to prevent its passing the reversion.

Will—Construction—Election.

Devise of *Black Acre* to Defendant for life, made conditional upon his confirming the disposition in the will of such of the hereditaments thereafter devised as were the property of testator's late brother *S. U.*, deceased, followed by a residuary devise of "all and every the manors and hereditaments, being freehold of inheritance, of or to which testator was then, or at his death, should be seised or entitled at law or in equity for any devisable estate or interest, or which testator then had or at the time of his decease should have power to dispose by will, including lands known as Duchy lands," as to *White Acre*, and two other estates, to uses for securing an annuity to an annuitant for life, and as to all and singular the same manors and hereditaments (subject as to the three last-mentioned estates to the uses thereinbefore limited) to use of Plaintiff for life:—*Held* (following *Wintour v. Clifton*, 3 Jur., N. S., 74), that Defendant was bound to elect between *Black Acre* and certain Duchy lands, of which *White Acre* was one, and which stood limited to *S. U.* for life, with remainder to testator for life, with remainder to Defendant for life, with remainders over for life and in tail, with ultimate remainder to testator in fee, testator having no other Duchy lands.

Whether, if *White Acre* had not been mentioned, a case of election would have been prevented from arising, upon the ground that the testator contemplated the possibility of acquiring other Duchy lands in the interval between the date of his will and his death—*Quære*.

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reference thereto. The usual method of transferring lands and hereditaments of this description was by a surrender from the vendor to the purchaser; but they could also be, and occasionally were, passed by an ordinary deed of conveyance; and it was not the custom to surrender such hereditaments to the uses of wills, nor was such a course ever pursued.

Sir *Michael*, by his will, in 1797, devised to his trustees and the survivor of them, and the heirs of such survivor—All his messuages, lands, tenements, hereditaments, and premises in the parish of *Gwinear* in the county of *Cornwall*, and all other his messuages, lands, tenements, and hereditaments in the said county not thereinbefore devised, in trust, as to one moiety, for his nephew *Stephen Usticke*, for life, with remainder for his children in tail; and as to the other moiety, for his nephew *Robert Usticke*, for life, with remainder for his children in tail, with cross remainders between them in tail; with remainder to the use of the Defendant for life, with divers remainders over for life and in tail, and an ultimate remainder to the use of his own right heirs. Immediately after which he proceeded to devise as follows: “I give, devise, and bequeath unto Lady *Dorothy Nowell* the rents, issues, and profits of all my Duchy and copyhold lands, hereditaments, and premises, to hold to her and her assigns, for and during the term of her natural life.”

Sir *Michael* died in 1802; and, upon his death, Lady *Dorothy* took possession of the Duchy lands, and continued in possession until her death in 1812.

Upon the death of Lady *Dorothy*, *Stephen Usticke* being the heir at law of the testator, and assuming that the reversion in the Duchy lands expectant on the death of Lady *Dorothy* was undisposed of by the will, entered upon those

lands, and enjoyed undisputed possession of them during his life. He granted leases of the property as if he were absolute owner of the entirety, and not as, regarding one undivided moiety, merely tenant for life; the reservations and covenants being to and with him, his heirs and assigns: and he purchased a high rent and the seignorial rights, taking the conveyance to himself in fee, the lands being described as his lands of inheritance.

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Stephen died in 1821, without having had any issue, leaving *Robert Usticke*, his brother and heir-at-law.

On *Stephen's* death three instruments, each purporting to be his last will, were found to have been duly executed by him.

By the second of these instruments *Stephen* devised all his estates to trustees, upon trust, in the first place, to pay an annuity of 80*l.* to *Lenny Peters* during her life. He then devised as follows:—"I hereby give and devise to the same trustees all those my lands, tenements, and hereditaments, situate, lying, and being in the parish of *Wendron* in the county of *Cornwall*, and in the town of *Helstone* in the same county, being part and parcel of the manor of *Helstone*, in *Kerrier*, and whereof the fee simple and inheritance was lately purchased by me of *John Rogers*, Esq., the lord of such manor, and conveyed, or intended to be conveyed, to or in trust for me, all which premises are in the occupation of" (naming certain tenants) "as my tenants, upon trust, as soon as conveniently may be after my decease, to sell and dispose of the same for all my estate and interest therein." He then directed the trustees to pay certain legacies of 200*l.* and 600*l.* out of the proceeds of the sale; and after giving an annuity also out of such proceeds, he devised as follows:—"All the rest, residue, and remainder of my freehold, leasehold, Duchy,

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customary freehold, copyhold, and all other messuages, lands, tenements, hereditaments, and premises, wheresoever situate, and of what nature or kind soever, and all other my estate and effects, both real and personal, not hereinbefore given, devised, and bequeathed, subject nevertheless to the payment of my just debts, and to the trusts hereinbefore declared; and all the lands, tenements, and hereditaments so devised in trust as aforesaid, after such trusts shall have been fully performed, I give, devise, and bequeath to my nephews," the Defendant and *Lewis Peters*, "their heirs, executors, administrators, and assigns, in equal shares and proportions."

This will had never been cancelled, but having been used by the solicitor as the draft for the third instrument, it had been considerably altered, and erasures had been made in various parts of it.

The third instrument was substantially the same as the second, but had been cancelled by the destruction of the signature and seals.

Under these circumstances considerable litigation took place between the parties interested under the first and second of these instruments, and *Robert Usticke*, the brother and heir-at-law of *Stephen*; and an issue having been directed by the Court of Chancery to try the validity of the first instrument between the parties claiming thereunder as Plaintiffs, and the Defendant and his uncle *Robert Usticke* as Defendants, the jury found that the first instrument was not a good will, and added, that they did not consider the second to have been revoked by the alterations made in it.

At the time of the execution of the second instrument, and thenceforward up to and at the time of his death, *Stephen Usticke* was beyond all question absolutely entitled

in fee simple to considerable real estate which came to him from his mother, and also to some which he had purchased himself; and such real estate, on the assumption of the second instrument having been a valid and unrevoked will, would have passed to the Defendant; but the Defendant, being aware that the finding of the jury with respect to the second will was immaterial to the issue directed by the Court, and, consequently, not binding, and being on good and friendly terms with his uncle *Robert*, and expecting that at the decease of his uncle he should succeed to the whole of the property, permitted his uncle, without opposition, to enter upon and enjoy, not only the whole of the Duchy lands, but also all the said other estates and hereditaments. *Robert* granted leases for lives of the Duchy lands in like manner as *Stephen* had granted leases, and with covenants and reservations similar in form to those before mentioned in reference to *Stephen*.

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Robert Usticke had not any other Duchy lands than those above mentioned.

Robert Usticke died in 1851, without having had any issue, leaving a will, dated 1844, whereby he gave the Defendant a freehold estate, called *Tregarne*, for his life, and also all the furniture, live and dead stock, and effects in and upon *Penwarne* (*Penwarne* being a portion of the freehold estates devised by the will of Sir *Michael Nowell*). He then proceeded to declare his will to be, that, in case the Defendant should not, within twelve calendar months after his decease, confirm, so far as he should be able to confirm, the title to such of the hereditaments and premises thereafter devised as were the property of his (the testator's) late brother *Stephen Usticke*, deceased, with their rights, members, and appurtenances, according to the limitations, powers, and provisoes thereafter expressed, declared, and contained of and concerning the same estate,

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then, and in such case, the said *Tregarne* estate, with its appurtenances, should, at the expiration of such twelve calendar months, go, remain, and be to the same or the like uses &c., as thereafter in and by this his will declared concerning his residuary freehold estate. Then, after certain unimportant provisions and bequests, the testator proceeded to devise thus:—"I give and devise all and every the manors, messuages, lands, tenements, and hereditaments, and real estate whatsoever and wheresoever, being freehold of inheritance, of or to which I am now, or at the time of my death shall or may be, seised or entitled at law or in equity for any devisable estate or interest, or of which I now have, or at the time of my decease shall have, power to dispose by this my will, and not hereinbefore disposed of, including all the manors and other hereditaments of or to which my late brother *Stephen Usticke* was seised or otherwise entitled at the time of his decease, and also including lands, tenements, and hereditaments, known as *Duchy lands*, to the uses hereinafter declared, that is to say, as to, for, and concerning certain estates called *Trehill* and *Trewennack*, in the parish of *Wendron*, and an estate called *Treland*, in the parish of *Saint Keverne*, with their appurtenances, to the use, intent, and purpose that *Lenny Peters* and her assigns should yearly, during her life, receive a yearly rentcharge of 80*l.*" The testator then gave certain powers of entry and distress; and subject thereto and to a term of 100 years for securing the same annuity, he declared the uses of all the property so devised as follows:—"As to, for, and concerning all and singular the manors, lands, and other hereditaments last hereinbefore devised, subject, nevertheless, and without prejudice as to the said estates called *Trehill*, *Trewennack*, and *Treland*, to the uses hereinbefore limited, to the use of my great nephew," the Plaintiff, "for his life, with remainder to his children in tail."

In pursuance of the provisions in the will of *Robert*, the Defendant and *Lenny Peters*, within twelve months after the decease of that testator, executed deeds confirming his will; the effect of the deed executed by *Lenny Peters* being to release her claim to an annuity of 80*l.* provided for her by *Stephen's* second will; and the Defendant entered into possession of the *Tregarne* estate.

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The Plaintiff and Defendant agreed to be bound by the opinion of the Court upon a special case, comprising the foregoing statements, it being arranged that the same should embrace the question, whether a case of election was raised by the will of *Robert Usticke* as to any and what parts of the property. Under these circumstances, the opinion of the Court was requested on the following question:

Is the Plaintiff or the Defendant the party entitled to the said lands and hereditaments, parcel of the ancient Duchy of *Cornwall*, or to any and which of them, or to any and what parts thereof.

Mr. *Rolt*, Q. C., and Mr. *C. Hall*, for the Plaintiff—contended, that the question in the special case must be answered in favour of the Plaintiff, whether the reversion in the Duchy lands expectant on the death of Lady *Dorothy Nowell* did or did not pass by the will of Sir *Michael*.

Argument.

If that reversion did not pass by Sir *Michael's* will, the Plaintiff's right was clear; for in that case, on Sir *Michael's* death, it descended upon *Stephen* as his heir-at-law; and on *Stephen's* death it either passed by his second will to the Defendant, subject to the charges in that will contained, in which case, under the will of *Robert*, the Defendant was

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bound to elect between the Duchy lands and the *Tregarne* estate; or, if *Stephen's* second will was void, and *Stephen* died intestate as to his Duchy lands, then those lands descended on his death upon *Robert*, as his heir-at-law; and, in that case, the Plaintiff's right was clear, without putting the Defendant to his election.

But even if the Court should be of opinion that the reversion in question did pass by Sir *Michael's* will, the Plaintiff is entitled. *Robert*, by his will, purported expressly to pass Duchy lands. It is a fact, and one which the Court has a right to notice in a question of this nature(*a*), that, with the exception of the lands in question, *Robert* had no lands answering the description of Duchy lands. It follows, therefore, as in the analogous cases in reference to the execution of powers(*b*), that the lands in question must have been those which he affected to devise by his will, and as to which he called on the Defendant to confirm the disposition thereby made. That disposition could not have been intended to take effect out of a mere reversionary interest, expectant upon an estate tail; for, as to *Trewennack*, one of the Duchy lands in question, the devise was subject to an annuity: *Wintour v. Clifton*(*c*); and the rest were held by precisely the same title.

[They cited *Churchill v. Dibben*(*d*), *Dillon v. Grace*(*e*), *Morgan d. Surman v. Surman*(*f*); also *Grant v. Lynam*(*g*), *Shuttleworth v. Greaves*(*h*), *Sayer v. Sayer*, and *Innes v. Sayer*(*i*).

(*a*) Sir J. Wigram's Treatise on the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills. Prop. v.

(*b*) Sugd. Pow. Ch. vi. s. vii.

(*c*) 2 Jur., N. S., 456; *S. C.*, on appeal 3 Id. 74.

(*d*) 1 Sugd. Pow. 407, ed. 6.

(*e*) Id. 410.

(*f*) 1 Taunt. 289.

(*g*) 4 Russ. 292.

(*h*) 4 My. & Cr. 38.

(*i*) 7 Hare, 377; *S. C.*, on appeal, 3 M. & G. 606.

The VICE-CHANCELLOR intimated his opinion, that the reversion in the Duchy lands expectant on the death of the Lady *Dorothy Nowell* passed by the will of Sir *Michael*; upon that point, therefore, he need not hear the Defendant's counsel.

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Mr. *Malins*, Q. C., and Mr. *Giffard* for the Defendant, contended that the question must be answered in his favour.

The Court having decided that the reversion expectant on the death of Lady *Dorothy* passed by the will of Sir *Michael*, *Stephen* and *Robert* took each only an estate for life in the lands in question. Those lands, therefore, could not have been the lands referred to in the will of *Robert*, and as to which he calls on the Defendant to confirm the disposition made by his will: for the latter were defined by, him, first, as lands which had been the property of *Stephen*, that is, lands which were really *Stephen's* property to dispose of by his will; secondly, as lands of which he himself was then or might thereafter be seised, or of which he had then or might thereafter have power to dispose by his will; and he must be taken to have known the law, that he could not so dispose of lands of which he was merely tenant for life.

Nor is it necessary to have recourse to such a supposition; for *Robert* speaks in his will not only of lands of which he was then seised or had then power to dispose, but also of lands of which he might at his death be seised, or might at his death have power to dispose; and these words are satisfied by supposing him to have contemplated the possibility of acquiring other Duchy lands in the interval between the date of his will and his death. If a testator, having no *Birmingham* railway shares at the date of his will, bequeathes all the *Birmingham* railway shares of which he is then or may at his death be possessed, no question of

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election will arise, because he may have contemplated the possibility of buying shares of that description at some future time, of which, in that event, he would have power to dispose.

But even if, having regard to the express mention of *Trewennack*, one of the Duchy lands in question, the Court should be of opinion that the latter are those to which *Robert* refers, still the Court will presume that he did not intend to pass any estate in those lands beyond the reversion in fee, of which alone, under the will of Sir *Michael*, he had power to dispose. And the circumstance of his charging *Trewennack* with an annuity would not rebut that presumption, for he has charged not that estate only, but two other estates, forming no part of the Duchy lands,—estates of which he had full power to dispose, and which alone are sufficient to make it good; so that *Wintour v. Clifton* does not apply.

Another mode of construing *Robert's* will without supposing him to have attempted to devise that of which he had no power to dispose, is this:—*Stephen* had purchased the manorial rights, which he himself by his will calls “the fee simple or inheritance,” of these Duchy lands in fee; and quoad those rights, the lands would be correctly described by *Robert* as lands which were formerly the property of *Stephen*, and also (assuming *Stephen's* will to be invalid) as lands of which he, *Robert*, had power to dispose by that his will.

[They cited *Jones v. Tucker*(a), *Lord Raneliffe v. Parkyns*(b), and *Dummer v. Pitcher*(c).]

A reply was not heard.

(a) 3 Mer. 533.

(b) 6 Dow, 149.

(c) 2 M. & K. 262.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Taking the two instruments, the will of Sir *Michael Nowell* and that of *Robert Usticke*, together, I think it manifest that a case of election arises.

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As regards the first question that was argued, it is a mere legal point, but I cannot arrive at the question of election without determining it. The first question was, whether,—under the devise in the will of the first testator, Sir *Michael Nowell*, of “all his messuages, lands, tenements, hereditaments, and premises in the parish of *Guinear* in the county of *Cornwall*, and all other his messuages, lands, tenements, and hereditaments in the said county not before devised,” upon trust as to one moiety, for his nephew *Stephen* for life, with remainder for his children in tail; and as to the other moiety, for his nephew *Robert* for life, with remainder for his children in tail, with cross remainders between them in tail, with remainder to the use of the Defendant for life, and an ultimate remainder to the use of the testator’s own right heirs,—the Duchy lands now in question passed.

The tenure of those lands is described in the special case as originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years, under penalty of forfeiture. And it is also stated in the special case, that no surrender of lands of this tenure to the uses of a will is required. This, therefore, is like the common case of a devise of copyholds not surrendered to the uses of a will made since the passing of the Act 55 Geo. 3, c. 192, as to which *Doe v. Ludlam*(a) has decided that they will pass by a general devise. It is conceded, that property of this description

(a) 7 Bing. 275.
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passes not to the executor, but to the heir. It is, I apprehend, a species of real property; and I do not think that the circumstance of the general devise I have mentioned being followed by the devise to Lady *Dorothy Nowell* of "the rents and profits of all the testator's Duchy and copyhold lands, hereditaments, and premises" during her life, can have the effect of preventing the general devise from passing the reversion expectant on that life estate. For these reasons, without hearing the Defendant's counsel upon it, I decided the first question in his favour.

The first question being so decided, I arrive at the second, viz. whether a case of election arises under the will of *Robert Usticke*.

The facts are these:—Lady *Dorothy*, the tenant for life of the Duchy lands, lived till the year 1812; and upon her death in that year, *Stephen*, the elder nephew and heir-at-law of Sir *Michael*, entered, and was allowed to retain possession of apparently the whole of the Duchy lands, for he granted leases of them and took a conveyance from one *Rogers* of the manorial rights. He remained in that possession until 1821, and then died, having made three wills, which were of such a character that considerable litigation was likely to arise with reference to them; and such litigation did arise with reference to the first. The first of these wills, upon an issue from this Court, was found to be invalid. The jury upon that occasion added, that they did not consider the second will to have been revoked; but as that was *ultra vires*, being no part of the issue they were to try, a question might still arise, whether the second will was not open to dispute on the part of the heir-at-law. That heir-at-law was his brother *Robert*,—the tenant for life, as I have held upon the first question, of the other moiety of the Duchy lands, and who, upon *Stephen's* death, became entitled to a life estate in the whole of these

lands under the will of Sir *Michael Nowell*, independently of any question between himself and *Stephen*.

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But *Stephen*, by his second will, had dealt with the property in question in this way:—He had devised all his estates to trustees, upon trust, in the first place, to pay an annuity of 80*l.* to a Miss *Peters* for life; then he devised thus:—"I hereby give and devise to the same trustees all those my lands, tenements, and hereditaments, situate, lying, and being in the parish of *Wendron* in the county of *Cornwall*, and in the town of *Helstone* in the same county, being lately part and parcel of the manor of *Helstone*, in *Kerrier*" (these were the Duchy lands themselves) "and whereof the fee simple and inheritance was lately purchased by me of *John Rogers*, Esq., the lord of such manor, and conveyed, or intended to be conveyed, to or in trust for me; all which premises are in the occupation of" (and then he names his tenants) "as my tenants," clearly including not merely the manorial rights,—“the fee simple and inheritance,” as he describes it,—which he had purchased of *Rogers*, but the very earth and soil in the occupation of his tenants. And the devise is upon trust, as soon as conveniently may be after his decease, to sell and dispose of the same for all his estate and interest therein, and to pay legacies of 200*l.* and 600*l.* Then he gives an annuity, and then comes this passage:—"All the rest, residue, and remainder of my freehold, leasehold, *Duchy*, customary freehold, copyhold, and all other messuages, lands, tenements, hereditaments, and premises, wheresoever situate, and of what nature or kind soever, and all other my estate and effects, both real and personal, not hereinbefore given, devised, and bequeathed, subject nevertheless to the payment of my just debts, and to the trusts hereinbefore declared; and all the lands, tenements, and hereditaments so devised in trust as aforesaid, after such trusts shall have been fully performed, I give, devise, and bequeath to my nephews," the Defendant

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and *Lewis Peters*, "their heirs, executors, administrators and assigns, in equal shares and proportions."

The result is, that he has given the Duchy lands in question to trustees, upon trust to pay those legacies, and subject to that, he gives all the rest of his Duchy and all other lands, and all his residuary real and personal estate and effects to his nephews. He has made a complete disposition of what he calls his Duchy lands. His will was before the late Wills Act; and, according to the statements in the special case, as I understand it, he had no estate or interest in any Duchy lands except the lands in question. He gives all his Duchy lands, subject to the legacies and charges I have mentioned,—a circumstance which, I think, will explain a passage commented upon by the Defendant's counsel in the will of *Robert*, that the Defendant is to confirm, "so far as he shall be able to confirm," the title under that will to the Duchy lands,—to the Defendant and *Lewis Peters*: clearly affecting to dispose of all his interest in the lands in question, he having at his death no other interest in those lands than the reversionary interest, which, by the will of Sir *Michael*, was devised to his own right heirs. Looking to the case of *Wintour v. Clifton* (a), which I am bound to follow, and which seems, if I may venture to say so, to have been decided on very sound principles,—principles quite as applicable to the particular will I am now considering,—I cannot consider that the testator *Stephen Usticke* could have intended a reversion expectant on an estate tail to be the fund out of which the legacies I have mentioned were to be raised for the benefit of the legatees.

Coming, now, to the will of *Robert*, I find this declaration, and it is this which raises the question of election. After devising to the Defendant an estate called *Tregarne*

(a) 2 Jur., N. S., 456; S. C., on appeal, 3 Id. 74.

for his life, he says:—"Provided always, and I hereby expressly declare my will to be, that, in case" the Defendant "shall not within twelve calendar months after my decease confirm, so far as he shall be able to confirm, the title to such of the hereditaments and premises hereinafter devised as were the property of my late brother, *Stephen Ustick*, Esq., deceased, with their rights, members, and appurtenances, according to the limitations, powers, and provisos hereinafter expressed, declared, and contained of and concerning the same, then" the *Tregarne* estate is to go over.

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It was argued, that, by the words "such of the hereditaments hereinafter devised as were the property of my late brother *Stephen*," the testator must have meant such only as were really *Stephen's* property; and here I may observe, that the question of election may be divided into two branches, and on either branch I should be justified, upon sound principles, in holding a case of election to arise. Stopping at the words I have read, the testator, it is true, requires the Defendant to confirm the title made by his will to such of the hereditaments thereby devised as were the property of his late brother *Stephen*. And why is the Defendant to confirm the title to those hereditaments? No doubt, for this reason:—There had been a will of *Stephen*, to whom the testator was heir, by which *Stephen* had made the Defendant his residuary devisee; and, assuming that will to be valid, and *Stephen's* residuary property to have passed by it to the Defendant, the testator *Robert* calls on the Defendant to confirm the disposition in his own will with reference to such of the hereditaments thereafter devised as were the property of *Stephen*. Then, if it is allowable to look back to *Stephen's* will—as to which possibly there may be a question, since it is not recited in that of *Robert*,—to ascertain what it is that *Robert* means when he speaks in his will of "hereditaments which were the property of *Stephen*," the case is clear. For *Robert's* meaning

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is plain, that the Defendant, by means of the estate which *Stephen* has given him, is to confirm the title he has himself made by his will as to all such of the hereditaments thereby devised as were the property of *Stephen*. The hereditaments thereby devised include "all the manors and other hereditaments of or to which his brother *Stephen* was seised or otherwise entitled at the time of his death." And, looking to *Stephen's* will to see which of those hereditaments were treated by *Stephen* as his property, we find him plainly and expressly treating as his property the very lands now in question, and devising them as such to the Defendant and his brother.

But, independently of that branch of the case, and whether it is, or is not, allowable to look back to *Stephen's* will in the way I have suggested, a case of election arises as clearly and indisputably upon the subsequent clause in the will of *Robert*, in which he proceeds to declare the limitations which he has required the Defendant to confirm. That clause is as follows:—

"I give and devise all and every the manors, messuages, lands tenements, hereditaments, and real estate, whatsoever and wheresoever, being freehold of inheritance, of or to which I am now, or at the time of my death shall or may be, seised or entitled, either at law or in equity, for any devisable estate or interest, or of which I now have or at the time of my decease shall have power to dispose by this my will, and not hereinbefore disposed of, including all the manors and other hereditaments of or to which my said brother *Stephen Usticke* was seised or otherwise entitled at the time of his decease, and also including lands, tenements, and hereditaments known as Duchy lands, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinafter limited and declared."

In that passage, *Robert* expressly includes, not merely "all the manors and other hereditaments of or to which his brother *Stephen* was seised, or otherwise entitled at the time of his decease," but he adds this—"and also including lands, tenements, and hereditaments known as Duchy lands." The hereditaments, therefore, as to which he calls upon the Defendant to confirm the title made by his will, are not merely such of those mentioned in the first clause as were the property of *Stephen*, but such of those mentioned in the second clause, that is, expressly, "such of the hereditaments known as Duchy lands" as were the property of *Stephen*.

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It was argued, that, in the clause last cited, the testator has attempted to dispose of those lands only of which he was then or might at his death be seised, or of which he had then or at the time of his death should have power to dispose by his will; that he must be taken to have known that he had no power to dispose by his will of lands in which he had only a life interest, and, therefore, having regard to what he says in that clause, the Court must hold that he had no intention to dispose by his will of the Duchy lands. But that argument would go to the root of all cases of election. *Primâ facie*, the Court presumes, in all cases, that a testator has no intention to dispose by his will of anything of which he has not power so to dispose. That presumption arises, whether the testator does or does not describe them as lands of which he has power to dispose by will. But that presumption is not conclusive. It may be rebutted; and the question in all these cases is, whether upon the whole of the will it is so rebutted,—whether you find upon the whole of the will enough to show that the testator did intend to deal with property which in fact was not his own. If you do not, there is no question of election to be argued. If you do, a case of election arises; and it is immaterial whether the testator has or has not described

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what he attempts to dispose of as property of which he has power to dispose by will. No expressions of that kind can assist the construction in this respect further than the general rule of law would have assisted it. That general rule of law is, that, in sitting down to construe a will, you are to assume, *primâ facie*, that the testator did not intend to dispose of anything which was not his own to dispose of, and the circumstance of his having disclaimed such an intention will not make any difference, so far as the rule of construction is concerned. Then, looking to the whole of the will, I find the testator expressly disposing of Duchy lands. I find, independently of the will, that he had no Duchy lands, except those in question; and that he had no interest in the lands in question, except the reversion devised by Sir *Michael* to his own right heirs. That reversion, according to *Wintour v. Clifton*, I cannot hold that *Robert* intended to pass; and, therefore, I am driven to the conclusion that the presumption is rebutted, and that *Robert* did intend to pass by his will an interest in the Duchy lands in question, of which he had no power so to dispose.

The only further argument against this conclusion was, that, inasmuch as *Robert* speaks in his will of Duchy lands of which he was then or might at his death be seised, and lands of which he had then or might at his death have power to dispose, those words would be satisfied by supposing him to have contemplated the possibility of acquiring other Duchy lands in the interval between the date of his will and his death. It was argued (although it is only trying *idem per idem*) that if a testator, having no *Birmingham* railway shares at the date of his will, bequeaths all the *Birmingham* railway shares of which he is then or may at his death be possessed, no question of election could arise, because he may have contemplated the possibility of buying shares of that description at some subsequent time, of which in that event he would have power to dispose. This argument

raises a question of considerable nicety and interest, but it is one which, looking to the subsequent words in this will, and the reference there made to *Trewennack* as one of the Duchy lands of which he is attempting to dispose, it will not be necessary for me upon the present occasion to decide. When it has to be decided, it will, I think, be a matter of some difficulty to support the Defendant's contention, for this reason:—All the Court has to do is to gather the testator's intention from the words he has used; and certainly it seems a very whimsical intention, to impute to a testator, when he affects to dispose of all property of a particular character of which he has now or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may hereafter buy some such property.

Upon that question, however, it is needless, and I have no wish, to say more, because what follows in the will seems to me to conclude the whole case. After making the devise I have read of all the manors and hereditaments therein described, "including lands, tenements, and hereditaments known as Duchy lands," to the uses &c. thereafter limited and declared, the testator proceeds to declare those uses as follows:—"As to, for, and concerning certain estates called *Trehill* and *Trewennack* in the parish of *Wendron*, and an estate called *Treland* in the parish of *St. Keverne*, with their appurtenances," to uses for securing an annuity for the benefit of *Miss Peters* for life, and as to, for, and concerning all and singular the manors and hereditaments last thereinbefore described (subject, as to *Trehill*, *Trewennack*, and *Treland*, to the uses thereinbefore limited) to the use of the Plaintiff for life, with remainders over. Now, as regards *Trewennack*, looking to the charge of that annuity upon it in favour of *Miss Peters*, I cannot hold, consistently with *Wintour v. Clifton*, that the testator intended the devise

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to take effect out of the reversionary interest, of which alone he had power to dispose, in that particular estate. I must, therefore, hold that he intended to pass *Trewennack*, as it it were his own to dispose of absolutely by his will. I must also hold, that he considered he had so disposed of it by the words "Duchy lands;" for the words, "as to *Trewennack*," clearly show that he supposes he has passed it; and, except in the previous devise of "all the manors &c., including Duchy lands," he certainly had not passed *Trewennack*. I go back then to that previous devise with the light thrown upon it by the subsequent words "as to *Trewennack*, &c." and I find that he held by precisely the same title with *Trewennack* the other Duchy lands in question,—*Menhay*, *Medlyn*, *Gweal Hellis*, and *Pennenna*. All these stand limited to precisely the same uses as *Trewennack*, and under precisely similar circumstances. That being so, it is an inference which cannot be resisted—what this Court calls a necessary inference, there being no other interpretation to be put upon it—that in the previous devise of Duchy lands he intended to pass all Duchy lands held by him by the same title by which he held *Trewennack*.

I prefer relying upon this branch of the case rather than upon the former, which would require me to call in aid the will of *Stephen*, as to which, as it is not referred to in the will of *Robert*, a question might arise whether I should be entitled to look at it, with a view to ascertain what lands the latter proposed to pass by the description Duchy lands. By his own will, *Robert* has made an express devise, which is to include every thing in the shape of Duchy lands of which he then had, or might thereafter have, power to dispose; and to interpret what he meant by Duchy lands, he has told me that *Trewennack* is one of them. Every portion of *Trewennack* was held by him under one and the same title with the other Duchy lands in question. There is no distinction between them; and a case of election arising as

to *Trewennack*, it arises equally as to the other Duchy lands in question.

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I must, therefore, hold that the Defendant, having taken the benefit of the devise to him of the *Tregarne* estate, was bound to confirm the will as to the Duchy lands to the extent to which he was able to confirm it, that is, only during his life; and the deed he has executed must be construed accordingly.

The result is, that the question must be answered in favour of the Plaintiff.

Mr. *Malins*, Q. C., asked, that, as the question was one of some difficulty, each side might bear its own costs. The case was like an administration suit.

The VICE-CHANCELLOR.—The circumstance of the question being raised upon a special case does not alter the principle that the successful party should get his costs. It is not a question of conduct; each party fairly claims what he thinks he is entitled to. Nor is it like an administration suit. The costs must follow the result.

DECLARE, that the Plaintiff is the party entitled to the lands and hereditaments parcel of the ancient Duchy of *Cornwall* mentioned in the special case. The Plaintiff to have his costs.

Minute of
Dees.

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July 1st, 2nd.

LEEDHAM v. CHAWNER.

*Trustees—
Breach of
Trust—Cestuis
que Trust con-
senting—Costs
incurred by—
Whether any
Lien for, on
Trust Property.*

Trustees for sale on decease of tenant for life having a prior legal estate—*Held*, not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of proceedings against them at law and in equity in reference thereto, notwithstanding such sale was attempted upon the solicitation of the tenant for life, and with the consent and approbation and by the direction of the cestuis que trust, one of whom was sui juris, the shares of the others, who were married women, being settled to their separate use without power of anticipation.

BY an indenture, dated 1816, being the settlement made in contemplation of the marriage of *Rupert Chawner*, since deceased, and *Judith* his wife, real estate was limited to the use of *Rupert Chawner* for life, with remainder to the use of *Judith* for life, with remainder to the use of trustees named *Cope* and *Hide*, and their heirs, upon trust, to sell, and to stand possessed of the moneys arising from the sale in trust for the children of the marriage, equally to be divided amongst them.

Rupert Chawner died in 1828.

There were three children of the marriage, viz. *George*, *Elizabeth*, and *Mary*.

After her husband's death, and when her children were all sui juris, *Judith Chawner*, the tenant for life, and each of her children executed several mortgages of their respective interests under the settlement, *Judith* joining with her children in each of their incumbrances.

After this the daughters intermarried, *Elizabeth* with the Defendant *Thomas Bennett*, *Mary* with the Defendant *Joseph Chambers*: a settlement having been made previously to the marriage of each daughter, by which her share in the hereditaments comprised in the indenture of 1816 was settled, subject to the incumbrance executed by her, upon trust for herself for life, to her separate use, without power of anticipation, with remainder over.

Subsequently, in July 1855, the mortgages being in

arrear, a suit was instituted by the several incumbrancers against *Judith Chawner*, *George Chawner*, *Bennett* and *Elizabeth* his wife, *Chambers* and *Mary* his wife, the trustees *Cope* and *Hide*, and the trustees of the daughters' settlements, praying that *Judith's* life estates in the several hereditaments comprised in the settlement of 1816, and the remainder in fee legally vested in the trustees upon the trusts of that indenture, might be sold, and the proceeds applied in payment of the amounts owing to the Plaintiffs respectively upon their securities, according to their priorities, and having regard to their estates and interests in the said securities respectively comprised.

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Statement.

The trustees, *Cope* and *Hide*, by their answer in this suit, claimed to have a lien upon the hereditaments comprised in the settlement of 1816, in respect of certain costs, charges, and expenses alleged to have been incurred by them in an abortive sale which they had attempted to make of the premises before the institution of the suit, and of certain proceedings instituted against them at law and in equity by the purchaser in reference to such sale.

By the decree made on the hearing of the cause in May, 1857, the hereditaments comprised in the settlement of 1816 were ordered to be sold, and the proceeds to be paid into the Bank to the credit of the cause. And an inquiry was directed, whether the Defendants, *Cope* and *Hide*, as trustees of the settlement of 1816, had properly incurred any and what costs, charges, and expenses with reference to any and what attempted sale of the premises, or in respect of any and what suit or actions relating thereto, and whether they had properly paid any and what amount of costs to the Plaintiff in such actions; and whether such sale was attempted with the consent or by the direction of any and which of the parties to this suit.

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In reference to this inquiry, the Chief Clerk certified to the following effect :—

In January, 1849, *Judith*, being then tenant for life of the premises, and both her daughters being then married, as already mentioned, *Cope* and *Hide*, as trustees of the settlement of 1816, on the solicitation of *Judith*, and with the consent and approbation and by the direction of *Judith Chawner*, *George Chawner*, *Bennett* and *Elizabeth* his wife, and *Chambers* and *Mary*, his wife, caused the premises to be offered for sale by auction, when 4928*l.* was bid on behalf of Sir *Oswald Mosley*, who afterwards paid 492*l.* 16*s.*, by way of deposit, to the credit of the trustees and *Judith*. Objections were afterwards taken to the title on behalf of Sir *Oswald*, upon the ground that the trustees were not authorised to sell the property during the life of *Judith* the tenant for life, and two actions were commenced by him against them for breach of contract. In the same year he filed a bill against the trustees and *Judith*, for delivery up of the contract, on the alleged ground of fraud and misrepresentation, praying in the alternative specific performance, if a good title could be made. This suit was defended by the trustees, under the advice of eminent counsel; and by the decree the bill was dismissed, but without costs.

Sir *Oswald* then commenced an action against the trustees to recover the amount of the deposit, which had previously been expended by them in satisfaction of their costs of the Chancery suit, of the attempted sale, of the two first-mentioned actions which had been abandoned, and of taking legal opinions as to their liability to return the deposit. The action was tried in 1851, when a verdict was given for the Plaintiff. The Defendants obtained a rule nisi for a new trial, on the ground that the jury ought to have been directed to find in their favour; but the rule

was afterwards discharged with costs, and Sir *Oswald* obtained judgment for the amount of the deposit and costs.

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Statement.

It further appeared by the Chief Clerk's certificate, that the trustees had paid out of their own moneys 700*l.*, being the amount of the damages and costs recovered against them by Sir *Oswald*; and that the costs, charges, and expenses of the trustees and *Judith*, incurred in and about the attempted sale, exclusive of the subsequent litigation, amounted to 104*l.*; the costs, &c., in defending the suit in Chancery, to 331*l.*; Sir *Oswald's* costs in the action paid by the trustees, to 203*l.* 13*s.*; and the trustees' costs in defending the abandoned actions and taking legal opinions, to 57*l.* 16*s.*

At the request of the parties, the question, whether the costs, charges, and expenses incurred by the Defendants *Hide* and *Cope*, or any and what part thereof, had been properly incurred, was adjourned for the consideration of the Court when the cause should come on for further consideration.

By the minutes prepared for the order on further consideration, it was proposed to take an order to the effect that the fund in court, arising from the proceeds of the sale of the hereditaments comprised in the settlement of 1816, should be divided into three equal shares; and that one of such third shares, being the value of *Judith's* life estate in the premises, should be carried over to the account of *Judith* and her incumbrancers; and that the remaining two of such third shares should be divided into three equal parts, and that such three parts should be carried over, one to the account of each of her children and his or her incumbrancers; and that the costs of the suit should be paid out of such shares.

Upon the cause now coming on for further consideration—
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 —
Argument.

Mr. *Bird*, for the Plaintiffs, contended, that the trustees *Cope* and *Hide* must bear the loss occasioned by their own breach of trust in attempting to sell the property comprised in the indenture of 1816 before the death of *Judith* the tenant for life, citing *Raby v. Ridehalgh* (a), *Booth v. Booth* (b), and *Caffrey v. Darby* (c).

Mr. *E. E. Kay* for all the Defendants except the trustees *Cope* and *Hide*, supported the same contention:—

Cope and *Hide* could have no lien upon *Judith's* share, for they were not trustees for her, she having a prior legal estate for life; nor could they have any lien upon the shares of their cestuis que trust, for, of the latter, two at the time of the sale were married women without power of anticipating their separate estates; and although the third was sui juris, his "consent, approbation, and direction" were confined to his own share.

Mr. *Rolt*, Q. C., and Mr. *Eddis* for the Defendants *Cope* and *Hide*, contended, that the costs, charges, and expenses mentioned in the Chief Clerk's certificate had been properly incurred, or at any rate they must be taken to have been so as against *Judith* who had solicited them to sell the property, and her children who had joined with her in "consenting to, approving, and directing" the sale, and consequently as against the Plaintiffs who claimed under those parties respectively.

But in any event *Judith* and *George*, who were sui juris and directed the sale, knowing all the while that married women were interested, who could not authorise a valid sale, were liable to make good the loss in which the trustees, upon the solicitation of *Judith* and by the direction of her and *George*, had been involved. Persons

(a) 7 D. M. G. 104. (b) 1 Beav. 125. (c) 6 Ves. 494.

soliciting or directing others to do an act which is a breach of trust, for their benefit, are bound to indemnify those whom they mislead against the loss they occasion.

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Argument.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is a hard case, no doubt, for the trustees ; but I see no way to help them out of the difficulty in which they have allowed themselves to be placed.

Judgment.

The facts are these :—The estate, the proceeds of which are now in question, stood limited to the use of *Judith Chawner* for life, with remainder to the trustees, the Messrs. *Cope* and *Hill*, upon trust to sell and to divide the purchase-money among her three children, *George Chawner* and his two sisters, both of them married women, having their shares settled to their separate use, without power of anticipation. In this state of things, and when only one of their cestuis que trust was sui juris, the tenant for life, being desirous to dispose of her life interest, solicits the trustees to sell the estate ; and *George Chawner* as to his share, and the two married ladies and their husbands as to their respective shares, consented, approved, and directed the sale. The finding of the certificate is, that the sale was attempted “upon the solicitation” of the tenant for life, and “with the consent and approbation and by the direction” of the cestuis que trust. That sale having been attempted by the trustees at a time when they were not authorised to sell the property, proceedings were instituted against them, both at law and in equity, by the purchaser. Attempts were made by the trustees, acting under the advice of eminent counsel, to protect themselves against

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these proceedings, but the purchaser eventually recovered his deposit ; and, in the end, a very serious loss was sustained by the trustees, in respect of the costs, charges, and expenses attending the sale and the proceedings so instituted against them.

The question is, whether the trustees have now a lien upon the trust fund, arising from the subsequent sale of the property by the order of the Court, in respect of those costs, charges, and expenses.

Now, with respect to the tenant for life and her interest in the fund, her position is this : She was the acting party throughout in regard to the attempted sale of the property. The sale was attempted upon her solicitation ; and by her conduct in the matter she incurred a decided moral, and perhaps a legal obligation. But the question for me to determine is, whether the trustees can retain out of her share of the trust fund produced by the subsequent sale of the property, that which she may be under a legal obligation to make good to them. It is clear, that, so far as regards her interest in the property,—she having a legal estate for life in it independently of her trustees—the trustees have no lien upon the fund. If things had remained in their present position for six years, until the Statute of Limitations had run, the trustees could not have filed their bill to establish a lien upon her life interest. As against the tenant for life, they have nothing beyond a possible right of contribution. Her estate was an estate at law. The trustees were in no way trustees for her, and they can have no lien upon her share in the purchase-money.

Then, as regards the cestuis que trust and their interest in the fund, it is scarcely arguable that the married women should be held liable in respect of the costs incurred by the

trustees. There is no averment of any fraud or concealment on their part. And, as against them, the case of the trustees amounts simply to this, that they have taken advantage of that facility, which trustees so often exhibit in consenting, at the solicitation of their cestuis que trust, to do acts which the latter have no power to authorise, notwithstanding the certainty, that, if there be the slightest irregularity in the acts so done upon such solicitation, the very persons who have led them astray, will be the first to turn against them, and to indemnify themselves at their expense—a certainty as to which all one can say is, that, perhaps, it is desirable, as being the best safeguard against breaches of trust.

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—
Judgment.

However, as regards the two ladies, who are married women, and who, although they have life estates to their separate use, have no power of anticipation, it is clear that I cannot fix them with any liability in respect of the costs in question. And the only question admitting of argument is, whether *George Chawner*, who was sui juris, can be held liable.

Now, as regards *George Chawner*, all that is found by the certificate is, that he “consented, approved, and directed the sale.” And, as regards “directing,” it is too much to say, that, because he took that course, knowing the shares of his sisters to be settled in the way I have described, he has, in effect, guaranteed the trustees against the loss they have sustained in consequence of those shares being so settled. Had there been any fraud practised by *George Chawner*, or any attempt on his part to mislead the trustees, it might have been otherwise. But it was no fault of his that the sale fell through. It fell through, because his sisters’ shares were settled—a fact which the trustees knew as well as he did. His consent, approval, and direction amount, in effect, as it seems to me, to no

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more than saying, "I am perfectly ready to sell my share, if you, the trustees, can see your way to selling those of my sisters." And it follows that in his case, as well as in the case of his sisters, and in that of the tenant for life, I must hold that there is no lien created.

The fund in court will be divided into the shares, and carried over to the several accounts, proposed in the minutes.

*Minutes of
Order.*

. DECLARE, that the Defendants *Cope* and *Hide* have no lien upon the fund in court in respect of the costs, charges, and expenses mentioned in the Chief Clerk's certificate. Then, an order according to the minutes. The trustees to pay their own costs of the inquiry relative to such costs, charges, and expenses.

Ordered accordingly.

1858.

LLOYD v. ADAMS.

July 16th.

ON the 24th of August, 1857, the Defendant commenced an action against the Plaintiffs for entering his close and digging and carrying away minerals. On the 22nd of December the Defendant delivered his declaration. On the 18th of February, the Plaintiffs having pleaded obtained leave to deliver interrogatories; and, on the 19th of February, interrogatories were delivered accordingly.

On the 2nd of March the Defendant obtained an order for ten days further time to answer the Plaintiffs' interrogatories. On the 12th of March a like order for ten days further time. And on the 22nd, another order for an additional ten days for the like purpose.

Affidavits having at length been sworn by the Defendant in answer to the Plaintiffs' interrogatories, the Plaintiffs, on the 8th of May, obtained a rule for the Defendant to show cause why he should not be orally examined, or file better affidavits; but, on the 11th of June, that rule was discharged.

Under these circumstances, on the 22nd of June, eleven days after the rule had been discharged, the Plaintiffs filed their bill for discovery in aid of their defence to the action. On the 25th of June the Defendant appeared to the Plaintiffs' bill. And on the 28th of June interrogatories for the examination of the Defendant in answer to the bill were served on the Defendant's solicitors.

affidavit, and notwithstanding notice of motion was given before the expiration of the time to answer the bill.

Practice — Bill for Discovery — Motion to stay Trial before Answer — Delay.

A Plaintiff filing a bill for discovery in aid of his defence to an action at law is at liberty, after filing interrogatories, to move to stay proceedings in the action without waiting for an answer, or even for the expiration of the eight days allowed under the old practice.

Motion to stay trial of an action until answer to such a bill refused on the ground of delay and the nearness of the trial, notwithstanding the bill was filed eleven days after discharge of a rule for Defendant to show cause why he should not be orally examined or file a better

1858.

LLOYD

v.

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Statement.

On the 7th of July the issue was delivered in the action, and notice of trial was given for the next assizes for the county of *Stafford*.

On the 10th of July the Plaintiffs gave notice of motion for the next seal (the 14th of July) to stay the trial of the action.

On the 12th of July the time to answer the Plaintiffs' interrogatories expired; and on the same day the Defendant applied by summons for a month's time to put in his answer. The summons was directed to stand over until after the motion for an injunction.

On the 16th of July the motion was heard.

It appeared that the commission day for the next assizes for the county of *Stafford* was fixed for the following day (the 17th of July).

It appeared, by the bill, that, as early as April, 1853, there had been similar litigation going on between the Plaintiffs and parties in the same interest with the Defendant, in reference to lands immediately adjoining the Defendant's close.

The Plaintiffs' case was supported by the usual affidavits as to the merits.

Argument.

Mr. *James*, Q. C., and Mr. *Speed* in support of the motion:—

Had this application been made under the old practice

previously to the Chancery Jurisdiction Improvement Act (a), the Defendant not having put in an answer within eight days after appearing to the bill, the Plaintiffs would have been entitled to the common injunction, as of course. The only question is, whether the new practice has deprived them of that right—whether, under the new practice, they are not entitled, upon making the usual affidavit as to the merits, to what is analogous to the common injunction until the answer of the Defendant has been put in.

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ADAMS.

Argument.

In reference to this question, it has been held by the Master of the Rolls, after consulting two other judges, that the 58th section of the Act was not meant to deprive a Plaintiff, under circumstances like the present, of his right to have an injunction analogous to the common injunction : it was simply meant to provide, that he is not to have it merely as of course, but only upon affidavit of the merits, in the same manner as a special injunction. It was not the intention of the Act to abolish the common injunction in principle, but only to place it on a new footing. "The 58th section does not destroy the Plaintiff's right to the benefit of a discovery in aid of his defence to an action at law ; it does not assimilate the practice completely and entirely to that in special injunctions, but 'so far only as the nature of the case will admit,' that is, the common injunction is not now to be obtained merely on the Defendant's default, as formerly, but a *prima facie* case must be stated in the bill, and be supported by affidavit(b) ;" and here that has been done.

The Plaintiffs, therefore, are entitled to an injunction until the Defendant shall have answered their interrogatories. "Any other course would practically prevent a

(a) 15 & 16 Vict. c. 86. in *Senior v. Pritchard*, 16 Beav.
(a) Per Sir J. Romilly, M.R., 476.

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 v.
 ADAMS.
 —
Argument.

Defendant at law from obtaining the benefit of a discovery in such cases" (a).

It is true that this application is made on the eve of the trial, but the delay has not been the fault of the Plaintiffs. No time was lost by them in filing their bill ; for, until the 11th of June, when the rule was discharged, they could not foresee what discovery they might obtain from the Defendant ; and that order having been discharged on the 11th of June, they filed their bill on the 22nd. Nor has there been any delay on their part since their bill was filed, for the time to answer only expired on the 12th of July, and on the 10th, notice of motion was given for the first seal day after the time to answer had expired.

[They cited also *Fitzgerald v. Bult* (b), and *Holme v. Brown* (c).]

Mr. *Rolt*, Q. C., and Mr. *Druce*, for the Defendant, were not heard.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD :—

Looking to the conduct of the Plaintiffs in this case, the delay which has intervened, and the time at which the application is made, it is impossible for me to grant the motion, so far as it seeks to stay the trial of the action.

The action was commenced as long since as last August ; besides which it appears by the bill that previously, and as far back as April, 1853, there had been similar litigation

(a) Per Sir *J. Romilly*, M.R., *Ibid.* (b) 9 *Hare*, Appendix, lxx.
 (c) *Id.* xxix.

between the Plaintiffs and parties in the same interest with the Defendant, with reference to lands immediately adjoining the piece of land now in question. In August, 1857, the action is brought ; in December the Defendant delivers his declaration ; and from that time, although it was perfectly clear that it was a most hostile case, nothing is done by the Plaintiffs with the view of staying the Defendant's proceedings until the 10th of July, when the notice of motion is served. Having slept so long upon their rights, the Plaintiffs cannot be allowed to come now, when the Defendant is on the eve of trial, and all is ready for the trial of the action, for the purpose of staying his proceedings.

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 LLOYD
 v.
 ADAMS.
 Judgment.

It was said, that, down to the 11th of June, when the rule was discharged, the Plaintiffs could not foresee what discovery they might obtain at law. But the deficiency of such discovery has been matter for complaint—whether well or ill founded I need not say—ever since I have sat here. The Plaintiffs should have been prepared for that result, and should have been ready to file the bill immediately the rule was discharged ; instead of which it is not filed for nearly a fortnight afterwards.

Then, again, there is further delay after the bill is filed. The bill is filed on the 22nd of June. The Defendant appears on the 25th, and this notice of motion is not served until the 12th of July, the commission day being appointed for the 17th. It was said that the Defendant had not put in an answer to the bill ; but he had appeared, and interrogatories had been filed. And a Plaintiff filing a bill for discovery in aid of his defence to an action at law, is at liberty, after filing interrogatories, to move to stay proceedings in the action, without waiting for an answer, or even for the expiration of the eight days allowed under the old practice. Here the Plaintiffs, instead of taking that course,

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 ADAMS.
 —
Judgment.

have allowed nearly three weeks to elapse since the appearance of the Defendant to the bill ; and, under these circumstances, to grant this motion to stay trial would be to revive some of the worst features of the old system of procedure.

So far from assuming that the motion is made with the bonâ fide purpose of obtaining the discovery prayed by the bill, under the circumstances of the case, and having regard to the delay which the Plaintiffs have allowed to intervene, I must assume them to be aware that they will get nothing in the way of such discovery, and that their real object is to gain time.

I must, therefore, refuse the motion as to staying the trial ; but there will be the common injunction staying execution until answer and further order.

Ordered accordingly.



NEALE v. CRIPPS.

June 9th, 12th.

*Jurisdiction—
 Waste—
 Stripping
 Estate of Timber—Injunction to restrain,
 against Party
 in Possession—
 Plaintiff
 claiming under
 Title at Law.*

GEORGE NEALE, deceased, by his will, in 1795, devised a farm and lands in the parish of *Haresfield*, in the county of *Gloucester*, to his godson *Charles Neale* for life, with remainder to his first and other sons successively in tail, with remainders over.

Charles Neale died in 1856, having had six sons, of whom the first and second died in infancy and without issue. The Plaintiff claimed as eldest son and heir in tail from stripping an estate of timber, granted upon motion by a Plaintiff claiming under a title at law.

of the third, the Defendants claimed through the fourth son of *Charles Neale*.

On the 26th of April, 1858, the Plaintiff commenced an action of ejectment in respect of the premises, by causing a writ of ejectment to be served on one *Harris*, who, on the death of *Charles Neale*, had attorned tenant to the Defendants. On the 12th of May, the Defendants appeared to the writ as Defendants to the action, and as claiming to be entitled to the estate.

The bill prayed that the Defendants might be restrained from cutting down any timber or timber-like trees standing or growing on the estate, and from removing therefrom or disposing of any timber or timber-like trees which might already be cut, and from committing any other waste on the estate, and for an account.

By an affidavit filed on behalf of the Plaintiff, it was deposed as follows:—"The said Defendants have lately caused the timber and timber-like trees on the said estate to be cut down, and, to a considerable extent, since the said action of ejectment has been commenced, and they are proceeding to cause the remainder of the trees on the said estate which are of any value to be cut down; and the said Defendants or their said solicitors have cut down the timber standing on the said estate in such manner and to such extent as nearly to strip the land of all trees and timber-like trees thereon of any value; and I believe that the said Defendants have cut down the said timber, and are proceeding to cut down the remainder thereof, for the express purpose of wasting the value of the property of the Plaintiff in the said estate, and with intent to defraud the Plaintiff of his just right in the said estate; for the way in which the said timber is cut is so destructive, that it cannot be referred to any fair act of ownership."

1858.

NEALE

v.

CRIPPS.

Statement.

1858.
 NEALE
 v.
 CRIPPS.
 —
 June 9th.
 —
 Argument.

Mr. *Langworthy* now moved, *ex parte*, for an injunction, as prayed by the bill, submitting that the acts complained of were destructive and malicious, and such as no bona fide owner would do: and he cited dicta of the Vice-Chancellor in *Earl Talbot v. Hope Scott*(a), to show that flagrant acts of such a character would be restrained before judgment, notwithstanding the reluctance of the Court to interfere in favour of a Plaintiff who was out of possession, and claiming under a title at law.

The VICE-CHANCELLOR, after reading the extract from the affidavit, granted an interim injunction until the 14th of June, in terms of the prayer of the bill; with leave to serve notice of motion for the 12th: the Plaintiff undertaking to be answerable for damages.

June 12th.
 —

Notice of motion for an injunction in terms of the prayer having been served on the same day pursuant to this order, and the Defendants not appearing, Mr. *Langworthy* now moved for an order, according to the terms of the notice of motion.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I remember the acts of waste deposed to in the affidavit. As notice of motion has been served, and the Defendants have not appeared, you are entitled to an injunction until the hearing or until further order.

Ordered accordingly.

(a) *Supra*, p. 96.

1858.

NORTON v. NICHOLS.

THE Plaintiff claimed to be the proprietor of a new and original design for shawls, known in the trade as the "Mantilla Shawl," registered under the Act 5 & 6 Vict. c. 100; and to be entitled, by virtue of the Act and of such registration, to the copyright of the design, and the sole right to apply the same to shawls for three years from the date of registration; and he prayed, by his bill, that the Defendants might be restrained from making any mantilla shawl having applied thereto the Plaintiff's registered design in fraudulent imitation thereof, or any shawl of the Plaintiff's registered design, or of any design being an imitation thereof, and from in any way pirating or infringing such design; and for consequential relief.

On the 25th of November, 1857, the Plaintiff obtained an interim order for an injunction, and on the 9th of December an injunction until the hearing.

On the 9th of June, 1858, the Defendants moved to dissolve the injunction, but the motion was ordered to stand over until the hearing.

Upon the 12th of July the cause came on to be heard.

The Defendants did not dispute the novelty of the design, but submitted, that it had not been duly registered as required by the Acts relating to the copyright of designs—being the ground upon which they had previously moved to dissolve the injunction.

his right to require the Plaintiff to establish his title in an action at law, although he delays doing so until the hearing of the cause, and has previously moved to dissolve upon a ground which cannot be maintained.

But Defendants ordered to pay the costs of motion to dissolve, that motion being useless whatever might be the result of the cause.

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I I

July 12th &
13th.

Copyright—
Designs—5 & 6
Vict. c. 100,
s. 15.

The provisions of the Copyright of Designs Act, 1842 (5 & 6 Vict. c. 100, s. 15), relative to furnishing the Registrar of Designs with copies, drawings, or prints of the design to be registered previously to obtaining registration—*Held*, to have been complied with by furnishing him with a specimen of the article itself to which the design was applied.

Injunction—
Copyright—
Action—Motion to dissolve
—Practice—
Costs.

In a suit to restrain an alleged infringement of Plaintiff's copyright in a design registered under the Act 5 & 6 Vict. c. 100, the Defendant does not lose

1858.
 NORTON
 v.
 NICHOLS.
 —
Statement.

It appeared that the registrar of designs had registered the design in question upon being furnished with specimens of the shawl itself, and without being furnished with any other copy, drawing, print, or description.

Argument.
 —

Mr. Rolt, Q. C., and Mr. Bagshawe, jun., appeared for the Plaintiff.

Mr. Daniel, Q. C., and Mr. Webster, for the Defendants, contended,—

First, That the bill should be dismissed. The 15th section of the Act of 1842(a) was express, "That the registrar of designs shall not register any design in respect of any application thereof to ornamenting any articles of manufacture or substances, unless he be furnished in respect of each such application with two copies, drawings, or prints of such design." A specimen of a shawl was neither a copy, drawing, nor print of a design; nor was it "such a copy, drawing, print, or description in writing or in print, as would be sufficient to identify the design," as required by the 1st section of the Designs Act, 1850(b); and the case did not fall within the 11th section of the latter Act, which is confined to cases where copies, drawings, or prints cannot be furnished, or it is unreasonable or unnecessary to require them. Besides, there was not even a specification or description as required by that section.

Secondly, That, at all events, the point in dispute being a legal question, the Defendants were entitled to require the Plaintiff to establish his title in an action at law.

The VICE-CHANCELLOR said, he was of opinion that the provisions of the 15th section of the Act of 1842(c), relative to furnishing the registrar of designs with copies, drawings,

(a) 5 & 6 Vict. c. 100.

(b) 13 & 14 Vict. c. 104.

(c) 5 & 6 Vict. c. 100. The

15th section enacts "that the registrar of designs shall not register any design in respect of any

or prints of the design to be registered, had in this case been complied with by furnishing him with specimens of the shawl itself; and that no objection could be taken on the ground of the design not being duly registered. But upon the second point for which the Defendants contended he would hear a reply.

1858.
NORTON
v.
NICHOLS.
—
Argument.

Mr. *Rolt*, Q. C., in reply, contended, that the injunction should be made perpetual, without putting the Plaintiff to establish his title in an action at law. The Defendants had failed in their motion to dissolve, and had allowed the cause to go on to a hearing without asking for an action. At the hearing they had failed in the only objection they had raised to the decree asked by the Plaintiff; and having regard to that circumstance, and the delay which had intervened, they were now too late to ask for an action.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 13/58.
—
Judgment.

I have considered this case since yesterday, and looking to what Lord *Cottenham* says in *Bacon v. Jones*(a), I think an action should be tried.

In *Bacon v. Jones*, I find Lord *Cottenham*, who certainly was not backward to uphold the jurisdiction of this Court, making these observations as to the practice in regard to injunctions in patent cases. He says:—"When a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing; and in both cases, I apprehend,

application thereof to ornamenting any articles of manufacture or substances, unless he be furnished in respect of each such

application with two copies, drawings, or prints of such design."

(a) 4 My. & Cr. 433.

1858.
NORTON
v.
NICHOLS.
—
Judgment.

great latitude and discretion are allowed to the Court in dealing with the application." Then, after describing the courses open to the Court when the application is for an interlocutory injunction, he proceeds thus:—"When the cause comes to a hearing, the Court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the Court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right, and of the evidence by which it is established—these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened"(a).

Now, considering the great anxiety shown by Lord *Cottenham* upon all occasions to uphold the jurisdiction of this Court, when I find him speaking in that guarded manner as to the circumstances under which the Court may be justified in granting an injunction at the hearing without having recourse to a trial at law, and adding, that such a course was never taken in any case of which he was aware—I think I cannot say, that, in the case before me, if the Defendants wish for an action, although they have deferred asking for it until the hearing, and until they have moved to dissolve upon a ground which cannot be maintained, they ought not now to have an opportunity of making their application.

The bill will be retained, and the injunction continued in the meantime, upon the Plaintiff undertaking to bring an action.

Mr. *Daniel* then asked that the costs of the motion to

(a) 4 My. & Cr. 436.

dissolve might be costs in the cause. The bill might, after all, be dismissed with costs, and the same principle applied as in *Stevens v. Keating*(a).

1858.
NORTON
v.
NICHOLS.
Judgment.

The VICE-CHANCELLOR.—The Defendants having first moved to dissolve the injunction, and then asked for an action, the motion becomes a simply useless motion, and such it must remain, whatever may be the results of the cause. The costs of the motion, therefore, must be borne by the Defendants.

(a) 1 M'N. & Gor. 659.

CRAMP v. PLAYFOOT.

July 1st.

JOHN CRAMP, by his will, in 1854, devised to the trustees for the time being of the *Wesleyan* chapel at *Lamberhurst* and their heirs, for the purpose of erecting a school-room and offices thereto, a piece of ground lying at the east end of the said chapel. He then gave to his executors the sum of 400*l.* "upon trust, that they should, as soon as conveniently could be after his death, lay out and expend the same, or such part thereof as might be necessary, in the erection of a school-room and requisite offices on the said piece of ground thereinbefore given for that purpose; and, in case any part of the said 400*l.* should not be expended for that purpose, he directed that the same should be laid out in and towards the necessary repairs of the said chapel, at the discretion of the trustees thereof.

Will—Construction—
Charity—
Mortmain—9
Geo. 2, c. 36.

Devise of land for the erection of a school-room and offices, followed by a bequest of 400*l.* upon trust to expend the same, or such part thereof as might be necessary, in the erection of a school-room and requisite offices; and in case any part of the said 400*l.* should not be expended for

that purpose, the same to be laid out in certain repairs—*Held*, that the whole bequest was void under the statute 9 Geo. 2, c. 36, the executors not having any alternative, the first trust being express, but to apply part at least of the 400*l.* in a manner forbidden by the statute; and, inasmuch as the whole of so small a sum might well have been employed in building a school, an inquiry how much would have been sufficient for that purpose, as suggested in *Chapman v. Brown* (6 Ves. 404), would be useless.

1858.
 CRAMP
 v.
 PLAYFOOT.
 —
Statement.

The Plaintiff, as heir-at-law and one of the next of kin of the testator, filed his bill against the trustees of the chapel and others, praying to have it declared which of the devises and bequests in the will were void as being for charitable purposes; and that his rights as heir-at-law, and the rights of the next of kin of the testator, in such parts of the personal estate of the testator as were not well bequeathed, might be ascertained and declared; and for the usual administration decree.

Argument.
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Mr. *Bevir*, in the absence of Mr. *Rolt*, Q. C., appeared for the Plaintiff.

Mr. *W. Hislop Clarke*, for the trustees of the chapel, admitted that the devise of land for the school was void by the Statute of Mortmain, 9 Geo. 2, c. 36; also, that the bequest of the 400*l.*, had it been simply for the erection of the school-room upon the land comprised in the said devise, would have been void also: *Attorney-General v. Whitchurch*(a), and *Attorney-General v. Hinxman*(b). But here there is an ulterior bequest—"in case any part of the 400*l.* should not be expended in the erection of the school, that part is to be laid out in repairs of the chapel," which is a legitimate object. Under that bequest, whatever is not expended upon the school, must, under this trust, be applied for repairs. If the executors expend nothing upon the school, the trustees can claim the whole for repairs. The ulterior bequest is not to fail because the prior bequest cannot take effect(c).

[The *Attorney-General v. Hodgson*(d) was also cited.]

A reply was not heard.

(a) 3 Ves. 144.

(b) 2 Jac. & Walk. 277.

(c) As to this, see Sir *William*

Grant in *Chapman v. Brown*, 6 Ves. 410.

(d) 15 Sim. 146.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The devise of the land is clearly bad ; and the only question is as to the bequest of the 400*l*.

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Now, as regards the bequest of the 400*l*., it is only the surplus of that sum that is to be laid out in repairs. The executors have no discretion under the will. It is not at their option to spend the 400*l* alternatively, either in the erection of the school-room or in the necessary repairs of the chapel. The first trust is absolute,—“to lay out and expend the same” (the whole of the 400*l*.), “or such part thereof as may be necessary, in the erection of a school-room and the requisite offices.” And it is only as to “any part that shall not be so expended” that the trust for repairs is declared. The case differs, therefore, from the class of cases (*a*), where, trustees having a discretion to apply a bequest, either in a way which would be lawful under the statute, or in a way which the statute would forbid, the Court has upheld the gift upon the ground that the whole of what is bequeathed may be lawfully applied. Here, if the will is to be obeyed, some part at least of the 400*l*. must be applied in a manner forbidden by the statute, and it is only the surplus, which, according to the will, can be laid out for a legitimate purpose.

Nor is the case one in which it would be proper to direct such an inquiry as was suggested in *Chapman v. Brown* (*b*), where, the bequest being for building or purchasing a chapel and other purposes, which the statute prohibited, and if any overplus, then for such charitable uses as the executors should think proper,—which, standing alone, would have

(*a*) *Sorresby v. Hollins* (9 Mod. 221), *Grimmett v. Grimmett* (1 Amb. 212), *Attorney-General v. Parsons* (8 Ves. 186), and see *Carter v. Green* (3 K. & J. 591). (*b*) 6 Ves. 404.

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been a good bequest,—Sir *William Grant* said, if it could have been reduced to any certainty how much would have been employed by the executors for the purposes prohibited by the statute, the residue ought to be employed, under the latter direction, for charitable uses generally. And, accordingly, he considered whether that could be ascertained by reference to the Master, but came to the conclusion, that, under the circumstances of that case, it could not. Here the entire amount bequeathed for the erection of the school-room and offices does not exceed 400*l.*; and it is clear that the whole of that sum might well have been employed in building a school. So that, in this case, it would be useless to direct such an inquiry as is there suggested.

It occurred to me, during the hearing, that, looking to the terms of the trust for repairs, it might possibly be argued that the case was within the principle of a class which I have now under consideration in *Warren v. Rudall*(*a*), and of which *Avelyn v. Ward*(*b*) is an instance. But the cases are distinct. Here it is only a surplus to which the ulterior bequest relates.

There must be a declaration, that the bequest to the executors of the 400*l.* as well as the devise to the trustees of the land for a school, is void under the statute.

Decree accordingly.

(*a*) Reported *infra*, p. 603.

(*b*) 1 Vcs. sen. 420.

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WHARTON v. BARKER.

PETER MADDOCK, by his will, in 1821, devised and bequeathed all his real and personal estate and effects to his executors, upon trust, to sell and convert the same respectively, and to stand possessed of the money to arise from such sale and conversion, upon trust, after payment of his debts, funeral and testamentary expenses, to divide the remainder into two equal shares, and to stand possessed of one such share, upon trusts, for his daughter *Mary* for life, for her separate use, and after her decease for her children; and in case she should die without leaving issue, or, leaving such, all of them should die under twenty-one without leaving issue, then upon trust for his daughter *Sarah* for life, for her separate use, and after her decease for her children; and as to the remaining share, upon trust for his daughter *Sarah* for life, for her separate use, and after her decease for her children; and in case *Sarah* should die without leaving issue, or, leaving such, all of them should die under twenty-one without leaving issue, then upon trusts for *Mary* and her children, similar to those before declared of the first moiety for *Sarah* and her children. The will then proceeded as follows:—"And in case my said daughters *Mary* and *Sarah* shall both hap-

leaving issue, *then* I direct my trustees to pay one moiety unto the person or persons that shall *then* be considered as my next of kin and personal representative or representatives, agreeable to the order of the Statutes of Distribution, and the other moiety unto the person or persons that shall *then* be considered the next of kin and personal representative or representatives of my late wife *Sarah*, agreeable to the order of the Statutes of Distribution." At the date of his will, his daughter *Sarah* was the only child and sole next of kin of his late wife *Sarah*. The daughters survived the testator, and died without issue.

Held, that the persons entitled to the second moiety were those who, at the death of the surviving daughter, were the next of kin, according to the statute, of testator's deceased wife; and, having regard to the juxtaposition of the bequests, that the persons entitled to the first moiety were those who, at the same period, were the next of kin, according to the statute, of the testator.

Review of the authorities as to the time when the persons taking under bequests of this description are to be ascertained.

April 26th,
30th, & July
17th.

Will—Con-
struction—
Next of Kin—
Time when
Class to be as-
certained—
"Then."

Testator be-
queathed a
mixed residue,
upon trust, as
to one moiety,
for his daugh-
ter *Mary* for
life, with re-
mainder for
her children;
and as to the
other moiety,
for his daugh-
ter *Sarah* for
life, with re-
mainder for her
children, with
cross remain-
ders, and pro-
ceeded thus:—
"And in case
both my said
daughters
should die
without issue,
or, leaving such,
all should die
under twenty-
one without

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pen to die without lawful issue, or, leaving such, all of them shall die under the age of twenty-one years without leaving any lawful issue, *then* I direct my said trustees, their executors, &c., to pay one equal half part of all the said trust moneys *unto the person or persons that shall then be considered as my next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution, and the whole of the other equal part or share unto the person or persons that shall then be considered the next of kin and personal representative or representatives of my late wife Sarah, whose maiden name was Wharton, agreeable to the order of the Statutes of Distribution.*"

The testator died in 1825. At the date of his will, and at his death, he had two children only:—*Sarah*, his only child by his late wife *Sarah Wharton*, and *Mary*, who married the Defendant *Litler*. *Sarah* died in 1828, without having been married; *Mary* in 1851, without having had any issue.

The Chief Clerk certified,—

(1). That the Plaintiffs, and the Defendants *Samuel Wharton* and *Martha Wood*, were the next of kin, according to the Statutes of Distribution, of the testator's wife *Sarah*, at the time of the death of the survivor of the testator's two daughters.

(2). That no sufficient evidence had been adduced to show who, at such last-mentioned date, were the next of kin, according to the Statutes of Distribution, of the testator.

(3). That the person who, according to the Statutes of Distribution, was the next of kin of the testator's wife *Sarah* at the time of her death, was her daughter *Sarah*; and,

(4). That the persons who, according to the Statutes of

Distribution, were the next of kin of the testator living at his death, were his two daughters, *Mary* and *Sarah*; that the Defendant *Litler* was now the legal personal representative of *Mary*, and that he was also the legal personal representative of *Sarah* for the purposes of the suit.

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Questions of fact as to the correctness of the first and second paragraphs of the certificate were reserved for the opinion of the Court; but their discussion was postponed until the Court should have determined the previous question upon the construction of the will, viz. what classes of persons were intended by the testator by the words "the person or persons that shall then be considered as the next of kin and personal representative or representatives" of himself and his deceased wife respectively, "agreeable to the order of the Statutes of Distribution."

Mr. *Willcock*, Q. C., and Mr. *Toulmin*, for the Plaintiffs, were proceeding to contend that they and the Defendants *Samuel Wharton* and *Martha Wood*, as the next of kin, according to the statutes, of the testator's wife *Sarah*, at the time of the death of the survivor of the testator's daughters, were entitled to the moiety by the will directed to be paid to her next of kin—when they were stopped by the Court.

Argument.
—

Mr. *Rolt*, Q. C., and Mr. *Cole*, for the Defendant *Litler*, as the personal representative of both the daughters, claimed both moieties of the fund:—

By his own "next of kin and personal representative or representatives, agreeable to the order of the Statutes of Distribution," the testator meant his next of kin, according to the statutes, at the time of his own decease; that is, his two daughters, both represented by this Defendant. By the

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corresponding expression in the case of his deceased wife, he meant her next of kin, according to the statutes, at the time of her decease. But whether at his wife's decease or at his own, *Sarah*, the daughter, was sole next of kin of her mother, and, on either construction, would be entitled to the whole of that moiety.

The VICE-CHANCELLOR.—The words are, “that shall *then* be considered.” In that context, is not the word “then” necessarily an adverb of time referring to the death of the surviving daughter?

Mr. *Rolt*.—Not more so than in *Cable v. Cable*(a), and *Wheeler v. Adams*(b). Besides, even if it be so, the words are, “that shall then *be considered*” and “agreeable to the order of the Statutes of Distribution.” The “consideration”—the inquiry—who those persons were, is to be postponed; the vesting is not to be postponed, for, except by reference to the death of the person whose next of kin you claim to be, the statutes can have no application: *Cable v. Cable* and *Wheeler v. Adams*;—two cases which must necessarily be overruled, if the Plaintiff's construction be adopted.

But, in any case, the Defendant *Litler* must be entitled to the moiety bequeathed to the next of kin of the testator's wife. For if the testator refers to the period of his wife's death, then *Sarah* only answers that description,—if to the period of distribution, then the statute can have no bearing upon the matter. The gift over is void from uncertainty. There is an intestacy as to that moiety. The two daughters take equally, and *Litler*, as their representative, is now entitled.

Mr. *Willcock*, Q. C., was then heard for the Plaintiffs; and Mr. *James*, Q. C., for the Defendant *Samuel Wharton*,

(a) 16 Beav. 507.

(b) 17 Id. 417.

and Mr. *Kenyon* for the Defendant *Martha Wood*, both claiming in the same interest with the Plaintiffs.

Mr. *Rolt*, Q. C., replied.

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[The following cases were also cited: *Seifferth v. Badham* (a), *Lasbury v. Newport* (b), *Bird v. Luckie* (c), *Pearce v. Vincent* (d), *Urquhart v. Urquhart* (e), *Harrington v. Harte* (f), *Jenkins v. Gower* (g), *Baines v. Ottley* (h), *Spink v. Lewis* (i), *Philps v. Evans* (k), *In re Barber's Will* (l), *Baldwin v. Rogers* (m), *Say v. Creed* (n), *Clapton v. Bulmer* (o), *Starr v. Newberry* (p), and *Bullock v. Down* (q).]

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD, after stating the facts, proceeded as follows:—

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The question I have to determine is, who are meant by the testator when he speaks of "the person or persons who shall then be considered the next of kin and personal representative or representatives" of himself and of his late wife respectively, "agreeable to the order of the Statutes of Distribution."

Upon this question, no one, attending simply to the

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| (a) 9 Beav. 370. | (k) 4 De G. & Sm. 188. |
| (b) Id. 376. | (l) 1 Sm. & Giff. 118. |
| (c) 8 Hare, 301. | (m) 3 D. M. G. 656. |
| (d) 2 Kee. 230. | (n) 5 Hare, 580. |
| (e) 13 Sim. 613. | (o) 5 My. & Cr. 108. |
| (f) Cox, 131. | (p) 23 Beav. 436. |
| (g) 2 Coll. 537. | (q) Rolls, not reported, and under appeal. |
| (h) 1 My. & K. 465. | |
| (i) 3 Bro. C. C. 355. | |

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terms of the will, and unembarrassed by the decisions pronounced in similar cases, could entertain any doubt. Some of those decisions, however, appeared to render the point obscure, and, accordingly, I have carefully examined all that were cited in the course of the argument, and many others also, amounting to some thirty or forty in number, but without finding any authority sufficiently strong to justify me in coming to a decision contrary to that which was the manifest intention of this testator.

The result of the authorities appears to me to be what I am about to state.

In the first place, I find it decided by a continuous stream of authority, interrupted a little possibly by some decisions of Sir *John Leach* (a), that, where there is a limitation by will to one for life, and, after his decease, then to the next of kin of the testator, those who are to take under the designation "next of kin" are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the tenant for life; in accordance with the broad principle of construction, by which all gifts to a class, following after a bequest for life in the same property, vest immediately upon the death of the testator, subject only to the superadded rule applicable to certain classes of relations, that, although the class is to be so far ascertained at the death of the testator as to comprise all such persons as may then be members, it will open to admit all such new individuals as may be introduced into it during the continuance of the tenancy for life or other limited interest, and previously to the time fixed for distribution. The vesting takes place immediately on the death of the testator, but, during the interval between that event and the period fixed for distribution, the

(a) See *Briden v. Hewlett*, 2 My. & K. 90, and *Bulter v. Bushnell*, 3 Id. 232.

shares so vested are liable to be divested, as regards the quantum of interest, in proportion as new individuals are introduced into the class.

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That being the first rule as to gifts by will to the testator's next of kin, preceded by a previous life interest given by the will in the same property, the next rule that I find established by the authorities is, that the mere circumstance that the person to whom such previous life interest is bequeathed by the will is also a member of the class who answered to the description of next of kin of the testator at the time of the testator's death, does not prevent the first rule from applying. Where the person to whom such previous life interest is bequeathed by the will is the only individual so answering to that description, the authorities have not been quite so clear as to the construction to be put upon the gift over. But as to the rest, the rules of the Court are clear. Neither the circumstance of there being a previous bequest for life or other limited period, nor the circumstance of the person to whom that previous bequest is made being also one of the next of kin of the testator at the time of his death, will prevent the Court from holding that the time at which the class is to be ascertained is the time of the testator's death, and not that fixed by the will as the period for distribution.

Such being the general rules, their application can only be prevented by a clear indication in the will, that, in the particular limitation in question, the testator did not intend them to be applied. For this purpose, the intention must be shown in language clear and unambiguous. Mere words of futurity are insufficient. As to this, some of the authorities have gone very far. A gift "to one for life, and afterwards to those who *shall be* my next of kin" (and not 'who *then shall be* my next of kin') has been held not to be sufficiently clear and unambiguous to prevent the rule from applying, Lord

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Thurlow saying, that all dispositions by will are necessarily future. The first case so decided by Lord *Thurlow* is that of *Rayner v. Mowbray* (a), which is certainly a very strong decision, but it has since been recognised as sound law. In that case, there was a devise of real estate in trust for the testator's wife for life, and after her decease in trust to sell, and "to divide and pay the moneys arising from the sale to and among all and every such person and persons who shall appear to be related to me only, share and share alike; and that such person or persons shall prove himself, herself, or themselves entitled to the same in six months after my said estates shall be so sold as aforesaid;"—certainly very strong words in favour of the construction that the period for ascertaining the class was to be subsequent to the death of the testator. But Lord *Thurlow* held the time of the testator's death to be the time when the class must be ascertained. He said, "The difficulty was, how to construe the word *relations* but by a reference to the Statute of Distributions. If it was a recent matter, there might be a doubt; but he took the statute to be declaratory of the old law Though the distribution is deferred to the death of the wife, that does not prevent the interests from vesting at the death of the testator." That was the conclusion which Lord *Thurlow* came to upon the language of the will then before him; and the decision is certainly a strong authority as to the necessity of language plain and admitting of but one interpretation, in order to prevent the rule from operating.

I will now take a leading case of the opposite description, in which the language of the will was held sufficiently clear for this purpose to prevent the operation of the rule; and it is one which, as it seems to me, must govern my decision upon the language of the will now before me. It is that of *Long v. Blackall* (b), before Lord *Loughborough*;

(a) 3 Bro. C. C. 234.

(b) 3 Ves. 486.

and the decision derives additional importance from the circumstance of its having been approved of by Lord *Alvanley* in *Holloway v. Holloway* (a), which has been looked upon as a leading decision the other way. In *Long v. Blackall* the testator bequeathed leasehold property in remainder to trustees, in trust for the child with which his wife was then enceinte, in case it should be a son; and after the decease of such son, then in trust for such issue male as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male, then the trustees should be possessed of the premises in trust for such persons as should then be the legal representatives of him the said testator—words almost identical in effect with those in the will before me, except that I have here the expression “the persons that shall then *be considered*,” instead of the persons “that shall then be,” as to which I shall speak presently. Lord *Loughborough* held, that there was no one who could take but the next of kin at the time of distribution. He says, “The testator altered a very sensible part of his will, which is vastly strong, for it proves he thought upon it, and had some decided meaning” (the will had been altered, having originally stood as the Lord Chancellor goes on to describe): “His first thoughts were very sensible, to give the absolute interest to his son, in case the entail could not take effect. In making that alteration, which he did with deliberation, not suffering his son to take this remainder after all the particular purposes were exhausted, it is quite impossible he should mean it to vest in his wife, transmissible to those who should become her legal representatives. It would be too much conjecture, to apply the words to an heir at law, particularly upon leasehold property. There is nobody, I think, who can take it but the next of kin at the time of distribution. He certainly meant to keep it in his blood.

(a) 5 Ves. 399.

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He could not mean it should be as if he had not disposed of it clearly." Lord *Loughborough's* view there is somewhat different from that which I adopt of the case before me. But I agree with what is there said, that when a testator has taken such pains to declare a trust in certain events for persons answering a particular designation, he could not have meant it to go as if he had not made any disposition of it at all. He must have meant it for *some* one besides those to whom the law would have given it in case he had died intestate.

That being the view taken of the will in *Long v. Blackall* by Lord *Loughborough*, in *Holloway v. Holloway*, which has been looked upon as a leading authority in favour of the opposite view, I find Lord *Alvanley* perfectly concurring in Lord *Loughborough's* judgment. There the testator bequeathed 5000*l.* in trust for one of his daughters, and after her decease for such children as she should leave at her decease. And in case she should die having no child, then, as to 1000*l.*, in trust for her executors; and as to the remaining 4000*l.*, in these words:—"In trust for such person or persons as shall be my heir or heirs at law." Lord *Alvanley* held, that the 4000*l.* vested in three daughters of the testator who were his co-heiresses and next of kin at his death. What he says is this, "The question arises upon a very doubtful clause. Unquestionably, it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character. The only question is, whether, upon the true construction of this codicil, it must necessarily be intended he did not mean by these words what the law *primâ facie* would strictly speaking intend—heirs at law at the time of his death. A testator certainly may by words properly adapted show, that, by such words, *persona designata*, answering a given character at a given time, is intended.

But *prima facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time, nor from the nature of the gift is there any necessary inference that it should not mean what the law would take it to mean, heirs at the death of the testator." Then he says, "It is not like the case of *Long v. Blackall*. The words there put it out of the power of the Court to put upon it any other interpretation, though it was much contended that it meant at the death of the testator. In that case, the word 'then' plainly proved that the personal representatives at the time of the death were not intended, and, if that word had not occurred, there was a great deal to show it could not be the intention; and that applies here, for there the wife was his executrix, and it would have been a strange circuitous way of giving it to her." And again he says, further on, "*Long v. Blackall* has that very leading distinction from this case, upon the word 'then,' that there could be no doubt personal representatives at a given time were intended; I must, therefore, hold, that if that word had not occurred, the judgment of the Lord Chancellor would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances." He, therefore, considers the occurrence of the word "then" in the will in *Long v. Blackall*, in the context in which it occurred, and in the sense in which it was used, as the turning point of the decision.

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Then came a valuable decision at common law in the case of *Doe v. Lawson*(a), where the same question arose upon a devise of real estate to the testator's natural son, followed by these words:—"And from and after his decease, then I give and devise the said premises unto the said last-

(a) 3 East, 278.

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mentioned trustees and their heirs, for and amongst such person and persons as shall appear and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the Statutes of Distribution have been entitled to my personal estate if I had died intestate;”—which is said here to be the meaning of the words “agreeable to the order of the Statutes of Distribution” occurring in this will. And in a subsequent clause, not so strong, there was a gift of the residue of his estate and effects, as to one moiety, “to be divided amongst my next of kin according to the Statutes of Distribution.” The counsel who argued in support of the proposition, that the persons intended were such as were the testator’s next of kin at the time of his death, and not such as were his next of kin at the time when the contingency happened, in the course of his reply, distinguished the case from that of *Long v. Blackall* by the absence of the word “then.” Lord *Ellenborough*, in giving judgment, said this:—“The case is sufficiently clear not to require any further argument. The limitation over is to such person and persons as shall appear and can be proved to be his next of kin, in such parts and proportions as they would by virtue of the Statutes of Distribution have been entitled to his personal estate if he had died intestate.” Those words are certainly very strong, and form a marked distinction between the will in that case and the bequest with which I have to deal. Lord *Ellenborough* continues:—“Now, when would they have been entitled to his personal estate if he had died intestate? At the time of his death. Then the distribution must be made at such a time as will best meet the words of the will, which is at his death, when the title by intestacy accrues, and must, therefore, be made amongst those persons who would then have been entitled to share if he had died intestate, or to their representatives. As to the words of description used being in the future, words to postpone the vesting in possession of an interest are naturally prospective. It could not be clear to the

testator himself who would take under the description at the time of his death, nor would it so appear to the trustees till after *Wilson's* death" (*Wilson* was the tenant for life) "and inquiry made. This, I think, is the plain and natural meaning of the words. But this construction is also supported by the case of *Rayner v. Mowbray*(a). There the distribution was not to take effect till after the death of the wife, but yet it was referred to such persons as would have been entitled to share at the death of the testator under the Statutes of Distribution. And there, too, the proof of relationship was to be made after the determination of the life estate, and for six months after the subsequent sale of the property. The same objection might be made there as here, that the inquiry was to be made at a future time; but still it was holden to relate to such as were entitled at the time of the testator's death. It is true, that there did not occur in that case the giving of an estate for life to one who was also entitled to a share of the remainder over in fee; but I see no inconsistency in that—at least not sufficient to get rid of the plain meaning of words." Lord *Ellenborough* does not advert to the omission of the word "then" in the sense in which it was used in *Long v. Blackall*. But Mr. Justice *Grose* says this:—"Rules for construing wills are laid down as the best method for getting at the intention of the testator. The case of *Rayner v. Mowbray* furnishes a rule of this sort, founded in good sense, and it applies so closely to the present, that only one distinction has been attempted to be made between them, and that one, I may say, has been answered by the other case of *Masters v. Hooper*(b), where an estate for life was previously given to the party through whom a share of the remainder over was claimed. And nothing is more common than that an estate for life should be given to one to whom a remainder over in fee is afterwards devised. Great stress has been laid on the words 'as shall

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(a) 3 Bro. C. C. 234.

(b) 4 Id. 207.

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appear and can be proved,' &c. But the omission of the word '*then*,' which has occurred in other cases, shows that the trustees were not to look to the persons who should be the testator's next of kin at the time when the contingency happened, but, according to the plain meaning of the words used, to such as were his next of kin at the time of his death, who alone were entitled to take by the Statutes of Distribution," implying that if the word "*then*" had so occurred, he would have taken a different view of the construction. Mr. Justice *Lawrence* makes very similar remarks; he says:—"The question is, what was the intention of the testator in adopting the words he has used? As to which I do not know how the construction put upon different expressions used in other wills can apply, unless where the cases have laid down some general rule of construction from whence the intention of a testator in other cases falling within the same rule may be collected. It has been urged in argument, that if the testator had intended to devise the remainder over to such as were his next of kin at the time of his death, he would, probably, have described them by name. Perhaps his not having so done may have introduced some doubt, and his meaning might have been clearer if he had so expressed himself; but, in fact, he does describe the same persons in another manner. The persons to whom the remainder over is limited, are to take in such proportions as *they* would by virtue of the Statutes of Distribution have been entitled to if he had died intestate; that, therefore, must refer to persons who were his next of kin at the time of his death." Mr. Justice *Le Blanc* makes some observations which may seem in favour of the construction contended for in this case on the part of the Defendant *Litler*:—"The question is, to what period the inquiry should refer? Now, even if the word *then* had been inserted in the place where it is contended that it must be implied, I am not clear that the clause would not still have been in favour of the Plaintiff; for,

though the distribution had been directed to be made amongst such persons as should '*then* appear,' &c., it would refer as well to the time *when* the inquiry was to be made—that is, when it became necessary to make the inquiry upon the happening of the contingency on which the limitation over was to take effect; but still the inquiry being directed to be made of such persons *as would by virtue of the Statutes of Distribution have been entitled to the testator's personal estate if he had died intestate*," (these words are in *italics* in the report, and all the judges appear to have relied very strongly upon them), "that must refer to the time of his death."

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These remarks of Mr. Justice *Le Blanc* are the most favourable, that I have been able to find, to the contention of the Defendant *Litler*, except those of the Master of the Rolls in *Wheeler v. Adams* (a), in which, as in *Doe v. Lawson*, the words "entitled under the Statutes of Distribution" occurred.

In addition to these cases, which illustrate all that it is necessary to say on the subject, I have also looked through all the more recent decisions upon the point, which seem to me to establish this and no more:—that the operation of the rule of construction, which fixes the death of the testator as the time for ascertaining the persons to take under a bequest like the present, is not excluded by the mere circumstance that words of futurity are used, nor by the circumstance that the person to whom the prior life estate is given would be one of the class to take if the persons it comprised were to be ascertained at the death of the testator; but that the application of that rule is excluded, where, after a previous bequest for life or other limited interest, there is a bequest "to those who *then* shall be" the next of kin of the testator, although it would seem,

(a) 17 Beav. 417.

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according to Mr. Justice *Le Blanc*, that in the case last supposed, if the ulterior bequest, instead of being, as there, "to those who then shall be the next of kin," were "to those who then shall appear to be his next of kin, in such parts and proportions as they would by virtue of the Statutes of Distribution have been entitled to his personal estate if he had died intestate," the rule would, again, become applicable, and the death of the testator would be the period for ascertaining the persons to take under that designation.

The words with which I have to deal in the case before me are not those put by Mr. Justice *Le Blanc*. In this will the word "entitled" does not occur in connexion with the mention made of the Statutes of Distribution, and the bequest is simply to those "who shall then be considered the next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution."

I have already observed, that, where the person to whom the previous life interest is bequeathed is the sole individual answering to the description of next of kin of the testator at the time of his death, the authorities have not been so uniformly consistent as to the effect of that circumstance upon the application of the rule which fixes the time of the testator's death as the time when the class is to be ascertained. But at the present day I should be bound, by the decision of Lord *Cottenham* in *Ware v. Rowland* (a), to hold that even in such a case the rule would apply.

Previously, however, to the decision in *Ware v. Rowland*, the authorities on this point were conflicting. In *Jones v. Colbeck* (b) there is a strong decision of Sir *William Grant*'s

(a) 2 Phill. 635.

(b) 8 Ves. 38. See also *Miller v. Eaton*, Sir Geo. Coop. 272.

in favour of the opposite contention. There the bequest was to the testator's daughter for life, and to her children at their ages of twenty-one, "and after the decease of his daughter, and of her children under the age of twenty-one, the residuum was to go and be distributed among the testator's relations in a due course of administration." Upon the death of the daughter, who was the testator's sole next of kin at his death, the residue was claimed by her representatives, and by the representatives of deceased nephews and nieces of the testator, who would have been his next of kin at his death if his daughter had not survived him. Sir *William Grant*, having held that "relatives" meant "next of kin" under the statute, said this:—"As to the claim of the daughter, it is hardly possible the testator could mean to describe an only daughter by the terms 'my relations,' directing also the residue to be distributed among those relations. Next, it is impossible that he could take this strange circuitous method of giving her the whole residue in the event of her dying without issue, instead of directly saying so. The relatives who were to take in case she should die leaving no issue, or none who should attain the age of twenty-one, could not be herself, transmitting her right to her representatives. Then, upon the claim of the nephews and nieces, the testator clearly supposed his daughter was to survive him. Then he knew she was his nearest relation, at all events one of his relations, taking that word in any sense. If, therefore, he intended to give to those who next to her should be his nearest relations, he would not have used an expression necessarily including her, but would have given expressly to the nephews and nieces, all of whom are mentioned before as legatees under that description, and it would be extremely difficult, as I have before observed, for them to take under the description of next of kin—a description which they do not answer. But if he meant relations at the death of his daughter, the expression is very proper. It involves no difficulty, it

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requires no construction ; I am clearly of opinion he could not mean either the representatives of his daughter or those of his nephews and nieces. What other sense, then, can be put upon it than that only intention which makes the whole perfectly consistent?" And he, therefore, held that the next of kin of the testator at his daughter's death were the persons entitled.



The observation, "it is impossible that the testator could take this strange circuitous method of giving his daughter the whole residue in the event of her dying without children, instead of directly saying so," which I find also in Lord *Alvanley's* judgment in *Holloway v. Holloway*, is certainly replete with good sense; but looking to Lord *Cottenham's* judgment in *Ware v. Rowland*, that reason taken alone would not be of sufficient weight to prevent the application of the general rule of construction.

Jones v. Colbeck has been cited as an authority by Sir *James Wigram* in *Say v. Creed* (a), although he purposely abstained from resting his own decision upon it. And the principle of Sir *William Grant's* decision has been acted upon by the late Vice-Chancellor of *England* in *Minter v. Wraith* (b), although the effect of that circumstance is somewhat shaken by the decision of the same Judge in *Urquhart v. Urquhart*, reported in the same volume (c), which I find it difficult to reconcile with the former. But, notwithstanding those decisions, I must take it to have been decided by Lord *Cottenham*, in *Ware v. Rowland*, that, although the person to whom the interest of property is bequeathed for life, with remainder to his children, is also, both at the date of the testator's death and of his will, his sole next of kin, that consideration will not be of sufficient weight to prevent the Court from holding that person to be entitled under a gift over, after the decease of the

(a) 5 Hare, 589.

(b) 13 Sim. 52, 63.

(c) Id. 613.

tenant for life without leaving issue, to the testator's next of kin,—in other words, that the testator meant to say, "I die intestate as to the corpus if this gift of it in remainder to the issue of the tenant for life cannot take effect." The reason for such a construction being, that the testator may have contemplated the possibility of other persons coming into existence between the date of his will and of his death, who in that case would, at his death, be his next of kin, either solely or jointly with the tenant for life; or that he may have contemplated the possibility of the tenant for life dying in his lifetime(a).

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In this state of the authorities I find it recognised in all the decisions, that if, in a gift to "next of kin," without referring to their claiming as under an intestacy, the word "then" occurs as an adverb of time, referring to the death of the tenant for life or other event fixed as the period of distribution, that circumstance is conclusive evidence that the testator did not intend the general rule of construction to apply.

In the cases before the Master of the Rolls(b), the Court was of opinion, from the context, that it was not so used, and must of necessity be construed to mean "thereupon" "in that event," so as to mark the conjunction of circumstances; but here I am absolutely precluded from construing the word "then" in the clause "unto the person or persons that shall *then* be considered the next of kin" as marking the conjunction of circumstances, by the fact that the same word has previously been used in that sense in the earlier part of the sentence, "*then* I direct that my said trustees, &c." So that no possible sense can be given to the word when it occurs the second time, unless it be read as an adverb of time. Besides, the words "agree-

(a) See *Pearce v. Vincent*, 2 507, and *Wheeler v. Adams*, 17 Kee. 230. Id. 417.

(b) *Cable v. Cable*, 16 Beav.

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able to the order of the Statutes of Distribution" occurring in this will immediately after the words "next of kin and personal representative or representatives" fall very far short of the expressions with which the Master of the Rolls had to deal in one of those cases (*a*), "for such person or persons as shall then be the next of kin and *would have been entitled* under the statutes in case she had died intestate."

As regards the bequest to the next of kin of the testator's deceased wife, it is true, that, according to *Philps v. Evans* (*b*), a bequest to the next of kin of a person who is dead at the date of the will, must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin, as regards the period of ascertaining who are the persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the will would naturally be the persons to take. But here I have two circumstances, which appear to me to take the present case out of the application of that rule. I have, in the first place, the fact, that at the date of the will the sole next of kin of the deceased wife was her daughter, so that the class was one which could not be increased if she survived the testator; and there being already a bequest to her for life, if the gift over in the event of her dying without leaving issue had also been intended for her, it would have been only natural for the testator to say so in so many words, instead of adopting the circuitous mode of expression which I find in his will. I have, in the second place, the circumstance, that the word "then" is clearly used as an adverb of time, referring to the death of the survivor of the testator's two daughters without leaving lawful issue; and with regard to the expression "*who shall then be considered*," I cannot hold the

(*a*) *Wheeler v. Adams*.

(*b*) 4 De G. & Sm. 188.

force of the word "then" as an adverb of time to be exhausted by construing it, as Mr. Justice *Le Blanc* suggests^(a) such an expression must be construed, as denoting the time when the inquiry is to be made. To hold, as was contended in argument, that the parties to take were to be ascertained, and to take vested interests immediately at the death of the testator, and that all the testator meant by this expression was, that you were not to take the trouble of considering who they were until the death of the surviving tenant for life and the failure of the issue taking under the previous bequest, would certainly be a very forced and unnatural construction to put upon the terms of this will.

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The case appears to me to be the converse of that to which Vice-Chancellor *Knight Bruce's* observations were applied in *Bird v. Luckie*^(b). Concurring with what is there said by the Vice-Chancellor, citing Mr. Justice *Dampier* in *Driver v. Frank*^(c), that plain words are not to be deprived of their obvious meaning merely because that meaning may lead to a result which would be capricious and eccentric, I think the words here are plain in favour of a construction which is neither eccentric nor capricious, and the question is, whether the insertion of this expression "considered as"—an expression which, to say the most, is only ambiguous—should induce me to attach to those plain words a meaning *introducing* eccentricity and caprice, which, if construed according to their obvious meaning, those words would not involve; for, to hold that the testator, after giving a life interest to his daughter with remainder to her issue, intended by this circuitous mode of expression to give the whole to that daughter in the event of her dying without issue, would certainly be capricious and eccentric. Had the expression been, "who shall then be,"

(a) *Doe v. Lawson*, 3 East, 292.

(b) 8 Hare, 301.

(c) 3 M. & Sel. 31.

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instead of "who shall then *be considered*," the construction would have been perfectly clear; and I cannot think the insertion of that doubtful expression sufficient to alter a construction which otherwise is clear and unambiguous.

Some portion of the reasoning I have pursued in reference to the share bequeathed by the testator in this case to his wife's next of kin, applies more strongly to that share than it does to the share he has bequeathed to his own next of kin; but, having arrived at the conclusion, upon the whole scope and intention of the will, that by the next of kin of his wife he meant to denote the next of kin living at the decease of the surviving tenant for life, I must adopt a like construction in reference to the gift to his own next of kin, the position of the two bequests in immediate connection with each other showing clearly, as it seems to me, that the testator intended to fix the same period in each case for ascertaining who were the parties to take.

This being my view of the construction of the two bequests, the argument must be resumed.

The argument was then resumed upon the questions of fact involved in the first and second paragraphs of the certificate.

July 17th.

The certificate was eventually confirmed, and there being an intestacy as to the moiety, which, according to the foregoing decision, was bequeathed to such persons as were the testator's own next of kin at the decease of his surviving daughter, the Court declared that the Defendant *Litler*, as personal representative of both the testator's daughters, was entitled to that moiety; and that the Plaintiffs and the Defendants *Samuel Wharton* and *Martha Wood*, as the

persons who, at the decease of the testator's surviving daughter, were the next of kin according to the Statutes of Distribution of the testator's deceased wife *Sarah*, were entitled to the moiety by the will bequeathed to the last-mentioned next of kin.

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Judgment.

ROBINSON v. PRESTON.

ANN FOSTER, and her sister *Nanny Foster*, were devisees as tenants in common of certain lands, producing a yearly rental of 800*l.* and upwards, the rents of which were paid as they fell due to the credit of an account opened in their joint names at the Craven Bank at *Settle*. The two sisters were of about the same age, resided together, and kept a common establishment. Both drew drafts on the bank as they had occasion; and the bankers were in the habit of investing portions of the balances standing to the credit of their joint account in the purchase of stock in their joint names.

Ann died in March, 1855, having, by her will, devised and bequeathed all her real and personal estate and effects to her sister *Nanny Foster* for life, and she appointed the Plaintiffs executors of her will.

whence the funds were derived, viz. rents of land of which the two were tenants in common.

As to the effect of a payment of moneys, in which two or more persons are interested as tenants in common, to their joint account at a banker's, without more—*Quere*.

The rule as to the investment of moneys in the names of two or more persons in the purchase of property is this:—If invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, it is considered by this Court to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common.

Harris v. Fergusson (16 Sim. 308) explained.

March 2nd
& 4th.
Investments in
Stock—Money
at Banker's—
Joint Names—
Tenancy in
Common—
Joint Tenancy
—Survivor-
ship.
Sums of stock
purchased in
the joint names
of two sisters,
and a balance
to their joint
account at their
banker's—
Held, under the
circumstances,
to belong to
them as tenants
in common,
notwithstand-
ing they had
contributed
equally, the
Court looking
(inter alia) to
the source

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Statement.

At the death of *Ann*, 1500*l.* 3 per cent. Consols and 5000*l.* New 3 per Cents., being the amount of the sums of stock purchased by the bankers, as mentioned above, were standing in the joint names of herself and her sister *Nanny* in the books of the Bank of England. A sum of 1000*l.*, which had been drawn in like manner from their joint account at the Craven Bank, was secured to both ladies by a mortgage to them of real estate as tenants in common, the covenant of the mortgagor being for payment of the mortgage money and interest to the mortgagees in equal moieties, and the instrument containing a declaration that the two ladies would hold as tenants in common; and there was also a balance at the Craven Bank to the credit of their joint account amounting to 3173*l.* 18*s.* 10*d.*, and cash in the house in which they resided amounting to 572*l.* 10*s.* 2½*d.*

In November, 1855, *Nanny* was found a lunatic; and in 1857 she died.

Doubts having been raised by the report of the Master in Lunacy as to whether, at the death of *Ann*, the sisters were tenants in common or joint tenants of property of which at her death they appeared to be in joint ownership, the Plaintiffs now filed their bill against the personal representatives of *Nanny Foster*, and the committee of her estate, praying that it might be declared that *Ann Foster* was at her decease, and that the Plaintiffs as her executors were now, entitled to one equal moiety of the 1500*l.* Consols, and 5000*l.* New 3 per Cents., and of the sums of 3173*l.* 18*s.* 10*d.* and 572*l.* 10*s.* 2½*d.*, as well as of the 1000*l.* invested on mortgage, and also to a moiety of the household furniture and effects found in the house at the time of her decease.

It appeared, that, before she became of unsound mind,

and during the lifetime of her sister *Ann, Nanny Foster* had made a will, dated 1838, and containing the following passage:—"I give and bequeath all my money, plate, and linen, and my share of all money in the funds and on other securities, and of the household furniture, wine, carriage, and all other effects, belonging jointly to my dear sister *Ann Foster* and myself, unto my said sister *Ann* for her own use absolutely, but charged, nevertheless, with the payment of all my debts, funeral and testamentary expenses, and the legacy of 100*l.*, which I bequeath to the trustees or treasurer for the time being of the General Infirmary at *Leeds*. I also will and direct, that, as soon as conveniently may be after the decease of my sister *Ann Foster*, the sum of 350*l.* stock, part of my share of 1500*l.* stock in the 3*l.* per cent. Consolidated Bank Annuities, now standing in the joint names of my sister and myself, shall be transferred into the names of *John Geldard* and *John Foster*." And the testatrix declared certain trusts of the last-mentioned legacy.

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PRESTON.
—
Statement.

In a subsequent part of her will, *Nanny Foster* had described the lands, of which she was tenant in common with her sister, as held by them "jointly."

The history of the household furniture and effects did not appear; but it was stated that the sisters took them as next of kin of their mother who had died intestate.

Mr. *Rolt*, Q. C., and Mr. *Prendergast*, for the Plaintiffs, contended, that they were entitled to a declaration as prayed by the bill.

Argument.
—

The two sisters must be considered to have been tenants in common of the funds in question and not joint tenants.

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 —
Argument.

There was, therefore, no survivorship ; but a resulting trust for each in equal moieties. The presumption in this Court is always against joint tenancy, and in favour of a tenancy in common ; and even if that rule were inapplicable, and the presumption were the other way, the circumstances of this case—the source from which the money was derived, and the mode in which the surviving sister speaks of it in her will—would be sufficient to rebut that presumption.

Mr. Willcock, Q. C., and Mr. Wickens for the Defendants—

The presumption on which the Plaintiffs rely applies to investments upon mortgage, but not to investments in the purchase of property. As regards the latter, the rule is, that, where two or more persons purchase property and advance the purchase money in *unequal* proportions, and this appears on the deed itself, they stand towards each other in the position of partners, and the survivor will be considered in equity as a trustee for the other in proportion to the sums advanced by each ; but where two or more purchase property and advance the money in *equal* proportions, and take a conveyance to them and their heirs, they will be held joint tenants in equity as well as at law ; for the Court will presume that they intended to purchase jointly the chance of survivorship—Per Sir *Joseph Jekyll* in *Lake v. Gibson* (a). And the distinction in this respect between a mortgage and a purchase is well founded, for a mortgage is simply a loan to be repaid.

But, besides this presumption, the circumstances of the present case are all in favour of the conclusion that the

(a) 1 Eq. Ca. Ab. 290, pl. 3 ; collected in White & Tudor's
S. C., nom. *Lake v. Craddock*, 3 "Leading Cases in Equity," vol. i.
P. Wms. 158. They cited also pp. 124 & seq.
 the other cases on this subject

sisters intended a joint tenancy. They were residing together, nearly of the same age, and the chances of survivorship were equal. They would naturally desire to avoid probate and legacy duty. The mortgage shows, that, when they wished to be tenants in common, they knew how to express that intention, and took pains to do so even where it was superfluous. Had they intended to be tenants in common of the stock, or of the money at the banker's, nothing would have been easier than to purchase the stock in equal moieties, one in the name of each sister, and, as regards the banker's books, to have separate accounts.

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ROBINSON
v.
PRESTON.
—
Argument.

As to the expressions in the will of the survivor, even there the property is described as "belonging *jointly*" to herself and her sister.

[They cited also *Harris v. Fergusson* (a), to show, that, where stock was standing in the name of two persons, notwithstanding it was purchased with money contributed by them in *unequal* portions, the Court had held the survivor entitled to the whole.]

Mr. *Rolt*, Q. C., in reply, explained, that as the money with which the investments were made in the purchase of stock consisted of surplus rents in which the two sisters were interested as tenants in common, and the ladies had but one purse and a common account at their banker's, it could not but be contributed in equal portions; and as to the word "jointly" in the will of *Nanny Foster* in reference to the stock, she had used the same expression in reference to the lands, which were clearly held by both as tenants in common.

Judgment reserved.

(a) 16 Sim. 308.

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PRESTON.

March 4th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is, whether the Plaintiffs, as executors of *Ann Foster*, are entitled to a moiety of certain stocks, funds, and other property, which were held under the following circumstances :—

It appears that this lady and her sister resided together, and they were possessed of the following property.—There was some household furniture and effects, the exact history of which does not appear ; it is stated that they took it as next of kin of their mother, in which case that portion would be held by them as tenants in common. There were also 1500*l.* 3 per cent. Consols, and 5000*l.* New 3*l.* per cent. Annuities, both standing in their joint names; 1000*l.*, vested in their joint names on a mortgage, as to which there was a declaration (unnecessary in truth) that they would be tenants in common ; a sum of 3173*l.* 18*s.* 10*d.*, standing in their joint names, in the books of the Craven bank at *Settle* ; and certain cash in the house, of a considerable amount.

The property being thus situated, *Ann Foster* died, leaving her sister surviving ; and the sister having since died, the claim is by the executors of *Ann* to have it declared that they are entitled, upon the ground that she was tenant in common with her sister of the property in question.

The law is settled as to the investment of moneys in the names of two or more persons in the purchase of property. If invested in unequal shares, the purchasers remain tenants in common of the purchased property ; if in equal shares, and the matter on the face of it purports to be a joint tenancy, then it is considered by this Court to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common.

Therefore, if this had been a simple case of so much

money advanced by each sister, and laid out in stock, then, inasmuch as the sisters were residing together, and nearly of the same age, and the chances were nearly even as to which would be the survivor, the case would have been a strong one in favour of the presumption, that there might be a desire on the part of both ladies to avoid probate and legacy duty, and to that end that there should be an actual joint tenancy.

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ROBINSON
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—
Judgment.

But the circumstances of the case are peculiar.

In the first place, the property has all arisen in this way : The ladies were tenants in common of certain freehold lands ; and the money which was at the banker's and the money which had been invested in these several securities, appear to have been the rents of those lands, which had been paid into the banker's to their joint account.

On one occasion when the investment was made in the form of a mortgage, there was an express declaration by the ladies that they were to be tenants in common of the mortgage security—a declaration which, as it was observed in the argument, was unnecessary, inasmuch as in the case of *Petty v. Styward*(a), one of the earliest authorities, it was held that a mortgage taken by two, although in equal shares, is a tenancy in common. Perhaps the ground of the distinction in this respect between a mortgage and a purchase is not particularly clear ; but it has been settled, and therefore it was unnecessary that any such declaration should be made. Still the fact of making it indicated, no doubt, the intention, and showed what was their desire, at all events with reference to that portion of their savings.

Besides that, there is the additional circumstance, that

(a) 1 Ch. Rep. 31.

1858.
ROBINSON
v.
PRESTON.
—
Judgment.

the lady who happened to be the survivor, before her lunacy, made her will, part of which was in these words—

[His Honour read the passage from the will as above, and proceeded—]

Now, as far as that will goes, it is plain that the testatrix considers herself as having an interest not only in the furniture—which, if the furniture was really held by the two sisters as tenants in common, would be an additional reason for looking upon the will as indicating her impression that the whole of the property was thus held—but also in “all money in the funds and other securities;” she speaks of “her share” in both, and treats both as property, which, as to her share in it, she can dispose of at her death, and which after her sister’s death will still form part of her own personal estate even in the event of her sister proving the survivor. It is true, she speaks of the whole as belonging “jointly” to her sister and herself; but it was afterwards called to my attention, that she uses the same expression with regard to her lands, which were not held by the sisters as joint tenants, but as tenants in common. I do not think, therefore, that the word “jointly” as used by her in reference to these effects can be construed in its proper and technical sense. In a certain sense, the whole of these effects were held by the sisters jointly; and the use of that word cannot, I think, countervail the clear expression of what she conceived to be the nature of her interest in the property.

To recur to the first point,—the source from which the property in question was derived,—it was derived, as I have noticed, from the rents of lands held by the two ladies as tenants in common. It was said, these rents might have been as easily paid in to separate accounts at the banker’s; but that would not have been so convenient an arrangement.

Probably it was paid by some agent acting on behalf of both ladies ; and I must assume it to have been ordered by them to be thus paid.

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—
Judgment.

I am not aware of any decision as to the effect of a payment of moneys, in which two or more persons are interested as tenants in common, to their joint account at a banker's, whether such a payment would fall within the doctrine as to mortgages, or within that as to purchases ; and perhaps I might be allowed to entertain some degree of doubt, if the case rested simply there ; but the bankers from time to time invested portions of these moneys, and I must assume that they did so by the direction of both ladies, in the purchase of stock in their joint names ; which no doubt, as it was argued, they might have invested in equal moieties, one in the name of each lady.

. Now, as to this part of the case, there is an authority in the Precedents in Chancery, which I find referred to by Sir William Grant in *Aveling v. Knipe*(a). It is the case of *Edwards v. Fashion*(b), and is thus reported :—"A man having a mortgage for years makes his will, and thereby devises all his personal estate, of what nature soever, to his executors in trust for the payment of his debts, and afterwards devises the residue and overplus of his said personal estate to his two daughters, equally to be divided between them, and dies." (Among his assets was a mortgage, and) "the debts being satisfied, the daughters contract with the mortgagor for the purchase of the equity of redemption and inheritance of the mortgage premises to them and their heirs ; and articles are executed on both sides accordingly, and a bill brought by the daughters for a specific execution of those articles, and a decree obtained for that purpose ; then one of the daughters makes her will, and thereby devises her moiety, share, and interest in the said

(a) 19 Ves. 440.

(b) Prec. Ch. 332.

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 —
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premises to the Plaintiff; who brought this bill to be relieved against the proceedings of the other daughter, who claimed the whole inheritance by survivorship as a joint tenancy, and had ejected the Plaintiff; and the question was, whether this purchase of the inheritance were a joint tenancy or a tenancy in common? The Master of the Rolls decreed it to be a tenancy in common, for so was the mortgage devised to the two daughters whereon this purchase of the equity of redemption and inheritance was founded; and, therefore, they having several and distinct interests as tenants in common in the mortgage, and paying an equal proportion for the purchase of the equity of redemption and inheritance, should have that in the same manner; and therefore the devise good."

Sir *William Grant*, in speaking of that case in *Aveling v. Knipe* (a),—a very strong case in favour of a joint tenancy, where the joint tenancy was held to exist, and not a tenancy in common, in consequence of equal advances,—comments upon it thus:—He says, "There is a case of *Edwards v. Fashion*, where two daughters of a mortgagee for a term of years, taking under the will the residue of his personal estate, including the mortgage, equally to be divided between them, afterwards purchased the equity of redemption to them and their heirs: it was held, under the circumstances, that there was no survivorship; but it is not stated as a general principle that articles of agreement" (*Aveling v. Knipe* was a case of articles of agreement) "must of necessity import a tenancy in common when in words it is a joint tenancy. That case proceeds on the ground that the purchase was founded on the mortgage; and the daughters being tenants in common of the mortgage, they were held to be tenants in common of the equity of redemption likewise."

(a) 19 Ves. 443.

That is a case that has some bearing upon the present, when one looks to what was the root of the property now in question, viz. rents of lands held by the two ladies as tenants in common.

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But, besides the first point, as to the root of the property, there is the second, viz. that when it was necessary for a deed to be executed, as in the case of the mortgage, there was actually a declaration that they would hold the money so invested as tenants in common. With regard to the investments in the purchase of stock, in those transactions there was of course no necessity for a deed to be executed, or any memorandum signed.

Then I find further the third point—perhaps the strongest of all, viz. that the sister who proved to be the survivor, and against whom of course her own declaration may be read, by her will, executed in the lifetime of her sister, not only speaks of “her share” of the property in question, but affects to dispose of it in favour of her sister; and, further, on the assumption that her sister will survive her, she directs that, after her sister’s decease, a legacy of 350*l.* stock should be paid out of a part of the stock in question, that part standing exactly in the same position as the rest.

These three circumstances concurring, and the whole being a question of intention to be ascertained from the circumstances of the case, it is not illogical to say, that the three combined have a force and carry a conviction, which, perhaps, any one of them taken alone would not produce.

As regards the case of *Harris v. Fergusson* (a)—a case in which the circumstances were peculiar, and which is very shortly reported—it is, if anything, somewhat favourable to the contention of the Plaintiffs that this is a tenancy in

(a) 16 Sim. 308.

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common. In that case there had been two purchases of stock in the joint names—the first made with moneys advanced by the two in equal shares, the second with moneys contributed by them unequally. The Vice-Chancellor decided, that the first, having been purchased by the two in equal shares, was held by them as joint tenants; “and he did not see how he could decide otherwise with respect to the second”—that is to say, from the circumstance of the first being a joint tenancy, he comes to the conclusion that the second is so also, there being nothing to distinguish that transaction from the former, except the proportions in which the purchase money was contributed.

But, in the case before me, I have this fact, that when there was any instrument to be executed, or any intention indicated, that intention was unequivocally manifested by even a superfluous declaration that the two sisters would hold as tenants in common and not as joint tenants. So far, therefore, as *Harris v. Fergusson* goes, it is at all events not unfavourable to the Plaintiffs’ contention. Upon the whole, although the case is one of some difficulty, the right conclusion appears to me to be, that the whole of this property was held by the two ladies as tenants in common, and the Plaintiffs are entitled to a declaration as prayed in the bill.

*Minute of
Decree.*
—

DECLARATION accordingly. Costs of all parties out of the fund.

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IN RE THE ATHENÆUM LIFE ASSURANCE
SOCIETY,

July 7th.

AND

IN RE THE PRINCE OF WALES LIFE ASSUR-
RANCE SOCIETY:
EX PARTE DURHAM.

SUMMONS adjourned from Chambers, on the hearing of an application on the part of *The Prince of Wales Society* for leave, under sect. 7 of the Joint Stock Companies Winding-up Amendment Act, 1857, to issue execution, or to take proceedings, against Mr. *Durham*, a shareholder of *The Athenæum Society*, in respect of 11,695*l.* 5*s.*, which *The Prince of Wales Society* had recovered in the Court of Queen's Bench against the official manager of *The Athenæum*.

*Insurance Com-
pany—Form of
Policy—Liabi-
lity of indivi-
dual Share-
holders—Cap-
ital—Misrepre-
sentation as
to—Joint Stock
Companies—
Winding-up—
20 & 21 Vict.
c. 78, s. 7—
Leave to issue
Execution.*

The instruments on which *The Prince of Wales Society* had recovered were three policies of insurance, by which,

A policy of in-
surance, head-
ed "Capital
100,000*l.*," pro-
vided that such
capital, and

other the property of the insurance society remaining at the time of any claim, should alone be liable to make good all claims upon the society under the policy; and that no shareholder should, by reason of the policy, be in anywise individually or personally liable to any such claims, or be in anywise charged by reason thereof, beyond the amount unpaid of his shares in the said capital.

An application by the assured for leave, under the 7th section of the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), to issue execution or take proceedings against an individual shareholder, who had paid in full upon his shares, in respect of the amount the assured had recovered in an action on the policy against the official manager of the society, was refused with costs, the Court being of opinion,—

(1). That the terms of the policy precluded the assured from any remedy at law against an individual shareholder.

(2). That, even if, upon the construction of the company's deed of settlement, the policy was in this respect less favourable to the assured than the deed required (which, *seems*, was not the case), that circumstance could not be insisted upon for the benefit of the assured, his rights being defined by the contract into which he had actually entered.

(3). That, assuming the mention made in the policy of the capital stock of 100,000*l.* to be equivalent to a representation that the society's capital actually amounted to 100,000*l.*, and to be a fraud on the part of the directors, the capital subscribed for at the date of the policy not exceeding 44,000*l.*, that circumstance would not entitle the assured to have execution against an individual shareholder.

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 SOCIETY;
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in consideration of the sums therein expressed to have been paid for premiums, *The Athenæum* agreed to pay to *The Prince of Wales Society*, on the death of a Mr. *Jodrell*, sums amounting to 10,500*l.*

Each policy was headed "Capital 100,000*l.*," and contained a proviso, that the capital stock of 100,000*l.* and other the stock, securities, funds, and property of the society remaining, at the time of any claim or demand made, unapplied and undisposed of and inapplicable to prior claims and demands, in pursuance of the provisions of the society's deed of settlement, should alone be liable to answer and make good all claims and demands upon the society or otherwise under or by virtue of such policy; and that no director, officer, or shareholder of the society, his heirs, executors, or administrators, should, by reason of such policy, be in anywise individually or personally liable or subject to any such claims or demands, or be in anywise charged by reason thereof, beyond the amount unpaid of his shares in the said capital stock, nor longer than he should retain the same shares.

It appeared, that the 28th section of the deed of settlement of *The Athenæum Society* contained a proviso as follows:—
 "That in every policy there shall be contained a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereafter contained shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability: Provided always, that nothing herein or in such contract contained, shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by

virtue of the aforesaid statute," meaning the stat. 7 & 8 Vict. c. 110, under which the society was registered.

It also appeared, that the capital subscribed for at the time when these policies were granted did not exceed 44,000*l*.

Mr. *Durham* was the holder and had been settled on the list of contributories in respect of 1000 shares in *The Athenæum*, and had paid up the full amount of his shares.

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Mr. *Daniel*, Q. C., and Mr. *Graham Hastings*, on behalf of *The Prince of Wales Society*, now applied for leave, under the 7th sect. of the Act of 1857 (a), to issue execution or to take proceedings against Mr. *Durham*, as mentioned in the summons; or that Mr. *Durham* might give security for payment of the sum for which judgment had been recovered, as mentioned in the 8th section of the Act. Or, if the Court should refuse such leave, then that the official manager might be directed to make a call sufficient to pay the amount so recovered.

Argument.
—

The Plaintiffs are not precluded from making this application by the form of the policies, even if those policies are to be construed independently of the deed of settlement of the society. But that is not the case, for, by the 28th section of the deed, it is provided that every policy shall refer to the deed, and that nothing in the deed contained shall limit the liability of any shareholder as to the performance of the contract comprised in the policies, or prejudice the rights of any person against any shareholder under or by

(a) 20 & 21 Vict. c. 78.

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virtue of the Act 7 & 8 Vict. c. 110. That proviso must be read as part of the policy; and thus interpreted the policy leaves the Plaintiffs at liberty to proceed against any individual shareholder for the amount of the society's debt, whether he has or has not paid to the full amount of his shares.

Besides, in this case, the policy contains a representation that the capital of the society amounts to 100,000*l*. Such a representation made by the directors, when they knew that the capital subscribed for did not exceed 44,000*l*, was a fraud on their part, in respect of which the shareholders are jointly and severally liable.

[They cited *Hallett v. Dowdall* (a).]

Mr. Rolt, Q. C., and Mr. W. D. Lewis, for the official manager, contended that the Plaintiffs were precluded by the terms of the policies from any remedy at law against an individual shareholder, whether such shareholder had or had not paid, as Mr. Durham had paid, in full the amount of his shares; *Hallett v. The Merchant Traders Ship, Loan, and Insurance Association* (b); *Hassell v. The Merchant Traders Ship, Loan, and Insurance Association* (c). And as regards the 28th section of the company's deed, if any thing in that section was repugnant to its general scope, or to the contract entered into by the policy, it was void:—Per *Cresswell, J.*, in *Hallett v. Dowdall* (d).

The VICE CHANCELLOR—How do you meet the argument as to the amount of the capital? If the shareholders, knowing that they were commencing business with a capital of 50,000*l*, profess to have a capital of 100,000*l*, will not that have the effect of doubling the liability of each, notwithstanding the clause in the policy? Such a representation

(a) 18 Q. B. 2.

(b) 13 Id. 960.

(c) 4 Exch. 525.

(d) 18 Q. B. 78.

must clearly tend very materially to influence those who effect assurances in a society.

Mr. *Rolt*, Q. C.,—If such a case exists it should be made against the company at large. Besides, it has been held that a representation that the capital of a company is so much, does not mean that the whole has been paid up, or that all the shares are taken; nor was such the case in *Hallett v. Dowdall*, or in the other cases cited.

Mr. *Amphlett*, Q. C., and Mr. *H. Stevens*, for Mr. *Durham*, supported the same contention.—The Plaintiffs might be entitled to make shareholders liable indirectly, by means of calls, as in *Lord Talbot's case*, *In re The Merchant Traders Ship, Loan, and Insurance Association* (a). But Mr. *Durham* had already paid in full; and according to the true construction of the deed, the 28th section provided no more than this, that nothing in the deed contained should limit the liability of shareholders to contribute to the assets of the society to the full extent of their shares. Beyond that extent there was a limitation to their liability.

Mr. *Daniel* replied.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If in this case there had been any question of fact to be tried requiring the assistance of a jury, I should have left it for a jury; but as it is reduced to a mere question of law, I have but one of two courses open to me—either to determine it myself, or to request the assistance of a common law judge.

(a) 5 De G. & Sm. 386.

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The latter course is the one I should take, if I had not already the advantage of so many opinions of common law judges repeatedly expressed upon the question. But with those opinions before me, it would be an idle formality, and would occasion useless expense to the parties, to request any judge to attend in this Court merely for the purpose of repeating what has been decided, in the Exchequer Chamber and elsewhere, in several cases, which I cannot distinguish from the present.

The contracts upon which *The Prince of Wales Society* has recovered at law are three policies, each of which contains the following proviso: [His Honour read the proviso stated above, and proceeded—]

As regards the first part of that proviso—viz that the available assets of the society shall alone be liable to make good the claims upon the society by virtue of the policies, the Courts of law have held in *Halket v. The Merchant Traders &c. Association* (a), and *Hassell v. The Merchant Traders &c. Association* (b), and the decision has been confirmed by the Court of Exchequer Chamber in *Hallett v. Dowdall* (c), that, upon a policy in such terms, the assured is precluded from any remedy at law against individual shareholders; the contract being that the assets of the society shall alone be liable to make good the claim upon the policy, an individual shareholder, although he has not paid his calls, is not liable to be sued at law upon the policy.

That decision did not of course affect the question of the liability of individual shareholders to have calls made upon them in respect of such claims; and when that question had to be considered in this Court, in the first of the cases

(a) 13 Q. B. 960.

(b) 4 Exch. 525.

(c) 18 Q. B. 2.

to which I have referred (a), in the course of the winding up of the company, the Court held that the shareholder was liable to pay calls made on behalf of the company. When those calls had been paid they became assets of the company, and having once become assets of the company they were applicable to the payment of claims. Possibly some question of that sort may arise hereafter in the case now before me.

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As regards the second part of the proviso—viz. that no shareholder shall, by reason of the policy, be individually liable to the claims in question beyond the amount unpaid of his shares, although, taken alone, it might seem to imply that as to that amount shareholders should be individually liable, so that to that extent the assured would have a right to proceed against individual shareholders, which, upon the first part of the proviso, he would not possess; yet, upon the whole of a contract in these terms, taking both parts of the proviso together, the effect is otherwise. The Courts of law have held in several cases that the effect of such a proviso is to protect the shareholders.

Such being the effect of the proviso in the policies in question, unless there be something special in the deed of settlement of this society, or some equity arising out of the mention made in the policies of the capital stock of 100,000*l.*, the case against Mr. *Durham* is concluded by repeated decisions.

Now, as regards the deed, the 28th section provides, "That in every policy there shall be contained a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same

(a) *In re The Merchant Traders &c., Company, Lord Talbot's case*, 5 De G. & Sm. 386.

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shall take effect and be satisfied only out of such funds and property of the society, as, under the provisions hereafter contained, shall, at the time at which such liabilities shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability." If the section had stopped there, a question might, perhaps, have arisen whether the only proper contract to be made by means of the policies to be granted by this society would not be one which should limit the remedy, in the manner in which it is limited by the first part of the proviso in each of the policies in question, to the existing assets of the company, as in *Lord Talbot's case*. But then comes this proviso: "Provided always, that nothing herein or in such contract contained, shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute."

Now, if that proviso is to be read absolutely, it makes the whole clause unintelligible; because, if the claim of the assured is to be limited, as it is in the first part of the clause, to the assets of the society, and yet is not to be limited in his rights against the individual shareholders, there is an inconsistency; and if so, then, as Mr. Justice *Cresswell* observes upon a section which has a considerable similarity to the present, part of the clause must be rejected. Of course, I should not think of rejecting any portion of the deed which could receive any reasonable construction; but, if one part of the clause provides that there shall be a limited liability, and another that every shareholder shall be liable without limit, the two are so inconsistent that I should be obliged to reject one of them. But I think the two may be reconciled in the way which was suggested in argument on behalf of Mr. *Durham*. In one sense the shareholders shall be fully liable, and yet the

liability shall be limited. In every policy there shall be a proviso, that the contract shall take effect only out of the available assets of the society, and so far the liability shall be limited; but nothing in the deed or in the contract contained shall limit the liability of the shareholder to contribute to those assets to the full extent of the responsibility which under the deed he may incur. Under the deed, the shareholders are responsible (*inter se*) to pay in full to the entire amount of their shares. Every policy, therefore, shall contain a proviso, that it shall be payable only out of the assets of the society, but not so as to prevent the shareholders from being personally responsible (*inter se*) to the full amount of the calls upon their shares.

But even if that were not the true construction of the 28th section of the deed, the Plaintiffs at law are precluded from asking this relief against Mr. *Durham* by the form of the contract which they have actually entered into by virtue of these policies. They have taken that contract, and have recovered upon it at law. That contract is, that they shall not recover from any individual shareholder beyond the amount of his calls. If that contract is not according to the deed of settlement of the society, if it was *ultra vires*, then it is a contract upon which they were not at liberty to sue at law. But their argument has been throughout that it was not *ultra vires*, but entirely within the scope of the deed; and what they contend is, that they are at liberty to import into it from the deed everything in their favour which the deed says shall be contained in it. As between the directors and the contributories, if it were for the interest of the contributories to contend that the contract, in this respect, is not in conformity with the deed, the question might be argued; but it is a contention which, I apprehend, could never be insisted on for the benefit of the Plaintiffs at law. They

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made their contract, and must take it as it stands. They get all they bargained for, but they cannot be heard to say, that if they had known the provisions of the deed they would have bargained for more. Their actual contract is all they can look to, and what that contract gives them is all they can recover.

Then, as regards the mention made in the policies of the capital stock of 100,000*l.*, even assuming that to be a representation that the capital stock actually amounts to 100,000*l.*, it would not entitle the Plaintiffs to have execution upon this contract against an individual shareholder. If the representation was a fraud on the part of the directors, the right course would have been to proceed against the whole company in respect of the fraud, and not against an individual shareholder. Whether such an application would have been successful after the decision of Vice-Chancellor *Kindersley* in *Evans v. Coventry* ^(a), it is not for me to say. The question whether, with this representation made on their behalf as to the capital of the society, the shareholders are not bound, jointly and severally, to make it good, is one which has not been discussed in the action, and could not be raised under a *scire facias*. The contract here is not to sue Mr. *Durham* beyond the amount of his shares; and even if the directors had said in that contract "we hereby state that the capital is 100,000*l.*," I could not hold Mr. *Durham* liable beyond the amount for which he has stipulated to be liable.

As regards Mr. *Durham*, therefore, I must refuse the application. I must also allow him the costs, because he has been brought here at his own expense.

But as between the creditors and the official manager,

(a) 2 Jur., N. S., 557.

it is right that something should be done. Creditors, who have established their claims, should have every reasonable means of enforcing them; and I shall be willing to listen, in chambers, to any proposals for making a further call, or for marshalling calls. Of course, I do not think it right that the Plaintiffs at law should pay the costs of the company. I think the question was one which it was right to have discussed.

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THE Court being of opinion that there is no such liability on the part of Mr. *Durham*, under the policies, as will authorise the issuing of execution, or proceeding by way of scire facias against him individually under the judgment, makes no order on this application, except that *The Prince of Wales Assurance Society* do pay him his costs. The official manager to have his costs out of the estate.

*Minute of
Order.*
—

1858.

July 22nd &
23rd.

THE ATTORNEY-GENERAL
v.
THE COUNCIL OF THE BOROUGH OF
BIRMINGHAM.

Public Works
—*Private*
Rights—
Rivers, public
and private.—
Drainage—
Nuisance—
Towns Im-
provement
Clauses Act,
1847—10 & 11
Vict. c. 34—
Injunction—
Delay—
Laches.

MR. ADDERLEY, the Relator and Plaintiff, was seised of a large family estate in *Warwickshire*, situate upon the river *Tame*, which flows through and on either side of that estate for about three and a-half miles, running close to and at the foot of the park and gardens belonging to the mansion. The *Tame* is a private river, and the bed and soil of it alongside of the Plaintiff's estate were now vested in the Plaintiff.

Public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to

Higher up the stream, and at an average distance of about seven miles from the Plaintiff's estates, the *Tame* is joined by the river *Rea*, after the latter river has flowed through the town of *Birmingham*.

Up to the passing of the Birmingham Improvement Act, 1851, the drainage of *Birmingham* and its neighbourhood was chiefly effected by means of various small sewers, which

restrain such interference, the circumstance that a vast population will suffer (e.g. by remaining undrained) unless his rights are invaded, is one which this Court cannot take into consideration.

The council of the borough of *Birmingham* were bound by a local Act of Parliament, incorporating The Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town:—*Held*, that they were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town and where it belonged to the Plaintiff.

Held also, that, assuming the inhabitants of *Birmingham* to have had before their Act a right to drain their houses into the river, that circumstance would not authorise the council in discharging the sewage in such a manner as to subject the Plaintiff to the inconvenience of which he now complained.

Held further, that, although Plaintiff had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of *laches* from now applying for an injunction, the rule in such cases being, that the mere prospect of injury does not give a right to this relief.

flowed into the *Rea* at different points, and the sewage, owing to the distance which it had to travel, and to its flowing through a variety of small outlets, became gradually purified by filtration before reaching the Plaintiff's estates, and had not any perceptibly bad effect upon the waters of the *Tame*, which were comparatively pure and clear, were well filled with fish, and from time immemorial had been used by the proprietors of land along the river for brewing and for agricultural and domestic purposes.

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Statement.

By the Birmingham Improvement Act, 1851, which took effect on the 1st of January, 1852, the mayor, aldermen, and burgesses of the borough of *Birmingham*, by the council of the borough, were empowered to carry the Act into execution. The limits of the Act were declared to be the municipal boundaries of the borough; and it was declared that the Act should be put in force within those limits or any part thereof. The Act incorporated the principal clauses of The Towns Improvement Clauses Act, 1847 (*a*), with respect to making and maintaining the public sewers (*b*);

(*a*) 10 & 11 Vict. c. 34.

(*b*) All of such clauses were thus incorporated, except those numbered 23, 28, 29, and 34, and except so much of clause 27 as provided that the council should submit the plan and estimate of the work therein referred to, and the surveyor's report thereon, to the inspector. Of the clauses thus incorporated, the most material are as follows:—

The 22nd, which provides that all public sewers and drains within the limits of the special Act, and all sewers and drains in and under the streets, with all the works and materials thereunto belonging, whether made at the

time of the passing of the special Act, or at any time thereafter, and whether made at the cost of the commissioners or otherwise, and the entire management of the same, shall vest in and belong to the commissioners.

The 24th clause, which provides that the commissioners shall from time to time, subject to the restriction therein contained as to the notice to be given and the plans and estimates to be prepared, cause to be made under the streets such main and other sewers as shall be necessary for the effectual draining of the town or district within the limits of the special Act, and also

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and it empowered the council to construct cesspools, or other receptacles for collecting and depositing the sewage, water, and refuse from the sewers, drains, and other places within or without the borough, and to provide and lay pumps, pipes, and apparatus for the collecting and distributing the same for sale or otherwise.

Shortly after the passing of the Act of 1851, the Defendants, the council of the borough, professing to act in execution of the powers thereby given to them, proceeded to plan and construct a new system of sewerage for the town and its neighbourhood, and constructed some additional sewers in the town; and in the year 1854, they projected and completed the construction of one large main sewer leading from the town to the river *Tame*, through which main sewer the whole or by far the greater portion of the sewage of the town and its neighbourhood

all such reservoirs, sluices, engines, and other works, as shall be necessary for cleansing such sewers; and, if needful, they may carry such sewers through and across all underground cellars and vaults under any of the streets, doing as little damage as may be, and making full compensation for any damage done; and if, for completing any of the aforesaid works, it be found necessary to carry them into or through any inclosed or other lands, the commissioners may carry the same into or through such lands accordingly, making full compensation to the owners and occupiers thereof; and they may also cause such sewers to communicate with and empty themselves into the sea or any public river, or they may cause

the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other purposes, as may be deemed most expedient, but so that the same shall in no case become a nuisance.

And the 107th clause, which enacts that nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be, deemed to be a nuisance at common law, nor to exempt any person guilty of nuisance at common law from prosecution or action in respect thereof, according to the forms of proceeding at common law, nor from the consequences upon being convicted thereof.

was emptied and discharged directly into the *Tame*, at the point where it is joined by the *Rea*, at the north-eastern boundary of the borough.

It appeared, that by means of these additional sewers a very considerable additional area of sewage, as compared with the old system, was carried off from the town and its neighbourhood; and it was part of the new system of sewerage, intended to be carried out by the Defendants, that all additional sewers which might thereafter be constructed, according to the increasing requirements of the town and neighbourhood, should run into this and other main sewers, and through them into the river *Tame*. The bill averred, and the averment was supported by the evidence, that in consequence of the new main sewer thus discharging itself into the river *Tame*, the water of the river at the point at which it discharged itself, and thence downward to and beyond the Plaintiff's estates, had become so much polluted, that fish could no longer live there, cattle could no longer drink of the water, and sheep could no longer be washed in the river. It also appeared by the evidence of numerous medical men, that the diseases engendered by the miasma from the river among the inhabitants of the houses adjoining its course, had been seriously aggravated by means of the Defendants' proceedings.

In October, 1854, shortly after the completion of the main sewer, it became clear that the emptying of the sewage was producing serious injury; and the Plaintiff, together with Lord *Bradford*, Lord *Leigh*, Sir *Robert Peel*, and other gentlemen, signed and forwarded to the Defendants a memorial, complaining of the grievous injury to which they were subjected. To this memorial, the Plaintiff, in November, 1854, received from the Defendants' surveyor the following reply:—

“ Sir,—In reply to the memorial presented to the town

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council of this borough, and to which your signature is attached, complaining of the emptying of the sewers of *Birmingham* into the river *Tame*, I beg to state the existing drainage of the borough gravitates by means of natural water courses, brooks, and the *Rea*, into the *Tame*; consequently, the injury of which you complain arises from natural causes. The council are now constructing a new system of sewers of vast extent, for the purpose of effecting a perfect drainage of the borough, the mains of which are in a forward state, but not sufficiently so to receive the lateral and house drains. To accomplish this every effort is being made. The main sewers have one common outlet near the *Tame* previous to discharging their contents into the river. It is intended to extract the manure from the sewage, and manufacture it into a highly-concentrated fertiliser for agricultural purposes. The fluid, after the operation, will pass into the *Tame* in a comparative pure state. Permit me to assure you, sir, as also the other memorialists, that it is the earnest desire of the Public Works Committee, to whom the council have entrusted the conduct of the works in question, to complete them at the earliest possible period, and thus effectually remove the nuisance of which you complain."

The Plaintiff took no further proceedings beyond frequently urging the corporation, in a correspondence which continued up to the filing of the bill, to expedite the completion of the scheme mentioned in this letter, until July, 1858, when, as the evil had not been removed, the present information and bill was filed, praying that the Defendants might be restrained from causing or permitting the main sewers to discharge themselves into the river *Tame*, and thereby polluting and injuring the river, and from causing or permitting the sewage of the borough in any manner to drain or pass into the river *Tame*, or to become a nuisance or injurious to the public health.

It appeared, that, since the filing of the bill, a second main sewer had been opened into the *Tame* above the Plaintiff's estates, with results similar to those produced by the former.

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Evidence was adduced on the part of the Defendants, to show that, previously to the incorporation of the borough, the inhabitants of *Birmingham* and other neighbouring townships had a vested and indefeasible right or easement by prescription to drain their sewage into the *Rea*, and thence into the *Tame*.

Mr. *Rolt*, Q.C., and Mr. *Rodwell*, in support of the motion, would not ask immediately for the order sought by the notice of motion. The Plaintiff was desirous not to press hardly upon the Defendants, and was willing that the Court should, by way of indulgence, afford them every opportunity of removing the evil complained of. He would be satisfied with an interim injunction to restrain the Defendants from opening additional public sewers into either of the main sewers, and an undertaking as to those already opened, as in the *Attorney-General v. The Luton Local Board of Health*(a).

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With regard to the undertaking, however, it must be so definite, as to afford the Plaintiff a guarantee, on which he can rely, that something effectual shall be done before Michaelmas term. The Defendants have already been allowed four years for making their experiments, and vague assurances that they will continue to do their best are now inadequate; there must be a definite undertaking that they will immediately resort to the most effectual operations and resources which science has discovered,

(a) 2 Jur., N. S., 180.

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either by way of some new system of drainage, or for deodorizing the sewage before it reaches the Plaintiff. If no bonâ fide attempt be made before Michaelmas term, the Plaintiff must then ask to have the nuisance abated at any cost.

It will be said that the Plaintiff should have made this application before the Defendants had expended their funds upon the operations which the bill seeks to restrain; but, had he done so, he would have been met by the objection that the Defendants had a right and were bound to drain the town, provided they created no nuisance, and that no nuisance would eventually be created; and upon that, any motion at an earlier date would have been dismissed with costs, as in *Haines v. Taylor* (a), upon the ground that the Plaintiff's right does not arise until the nuisance has been established.

Mr. Willcock, Q.C., and Mr. Springall Thompson, for the Defendants:—

The Defendants do not deny that the evil complained of is highly offensive; they have hitherto done, and will continue to do, their utmost to remedy the evil; but if put upon their defence, they submit, that, under all the circumstances of the case, the Plaintiff would not be entitled to relief even at law, and much less in this Court.

Though highly offensive, the evil is not what the law considers a nuisance. Besides, from time immemorial, the inhabitants of *Birmingham* have had a prescriptive right to drain their houses into the *Rea*, and thence into the *Tame*. The Defendants, representing the entire body of inhabitants, possess their collective rights in this respect, and are bound by this Act to exercise those rights, in

(a) 2 Phill. 209.

order to effect a thorough drainage of the town. As to this, the 24th section of the General Act^(a), incorporated in their Local Act, is imperative; and neither in that, nor in any other section of either Act, is there anything which requires the consent of neighbouring proprietors whose property may be injured—a circumstance which distinguishes this case from that of the *Attorney-General v. The Luton Local Board of Health*^(b).

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This is not an evil caused by an individual in the pursuit of his own private gain, but by a public body in the discharge of a public duty which the legislature has imposed on them.

But, assuming that a Court of law would give relief, it is not a case in which this Court should interfere. Rightly interpreted, the 107th section of the General Act is express, that if, in carrying on their operations, the Defendants occasion what at common law would amount to a nuisance, at common law must the remedy be sought. Besides, the jurisdiction by injunction is one which has ever been exercised with great caution, and only where the interference of the Court is clearly necessary to prevent great mischief; and if far greater mischief will be occasioned by its interference, the Court will refuse to interfere: *Attorney-General v. Cleaver*^(c), *Blakemore v. The Glamorganshire Canal Navigation*^(d), *The Earl of Ripon v. Hobart*^(e), *Attorney-General v. The Sheffield Gas Consumers Company*^(f). To hold otherwise, would be "to invert the purpose for which an injunction should be used"—Per Lord Cottenham, in *Neilson v. Thompson*^(g).

(a) 10 & 11 Vict. c. 34.

(b) 2 Jur., N. S., 180.

(c) 18 Ves. 211.

(d) 1 My. & K. 154.

(e) 3 Id. 169.

(f) 3 D. M. G. 304.

(g) 1 Webster's "Patent Cases,"
286.

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Here the evil, that must ensue if the Court should interfere, would be incalculable. If the drains are stopped, as prayed by the bill, the entire sewage of the town will overflow. *Birmingham* will be converted into one vast cesspool, which, in the course of nature, from the great elevation of the town, (450 feet above the sea level), must empty itself into the *Tame* as before, only in a far more aggravated manner. The deluge of filth will cause a plague, which will not be confined to the 250,000 inhabitants of *Birmingham*, but will spread over the entire valley and become a national calamity. The increase of population, inseparable from the progress of a nation in industry and wealth, is attended of necessity by inconvenience to individuals, against which it is in vain to struggle. In such cases private interests must bend to those of the country at large. The safety of the public is the highest law.

The VICE-CHANCELLOR.—We cannot talk of that in this Court. Here the safety of the public is that which the legislature has said is for the safety of the public, and no more.

Mr. *Willcock*.—But we must look to the nuisance to all, and not to anybody in particular.

Besides, the Court will consider the inconvenience of such an order as is prayed by the bill, if the cause should ever come to a hearing. Suppose Defendants to do their utmost, so far as human genius can go, to obviate the evil complained of, the *Attorney-General*, as representing the public generally, may still complain that there is a nuisance, and insist that there has been a breach of the injunction. Fifty experiments may fail, and as many applications be made to this Court, alleging that the injunction has been

broken: *Collins v. Plumb*(a). Such questions belong to a Court of criminal jurisdiction, and not to this Court.

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Consider, again, the difficulty of framing such an order. The order must either be specific, that certain definite and specified works be done to remedy the evil, or general and vague. If specific, it will embarrass the Defendants, who are already using their utmost endeavours, and may find a course which would prove much more successful than that ordered: if general and vague, it would fall within Lord *Cottenham's* objections in *Cother v. The Midland Railway Company*(b), enunciating merely what the Act of Parliament has already enunciated. In either case it will be an order of which the Court could not possibly secure the performance. The dignity of the Court requires that it should not order that which it cannot enforce, or which, if enforced, might end in a worse nuisance than before.

Here there has been and is perfect bona fides on the part of the Defendants in doing their utmost; they are still using every means to prevent the nuisance complained of. They cannot nor can this Court compel them to effect impossibilities; but they are trying, and will continue to try, every experiment which science, as it advances, can suggest; and an undertaking would only fetter them, by compelling them to adopt some one which might not prove the most effectual.

[They contended further, that, in any event, the Plaintiff having allowed the Defendants from 1854 to carry on the system of drainage of which he now complained, and to expend all their funds in carrying it out, was precluded by his own laches from asking this relief; and insisted, that, their funds being now exhausted, it was impossible for them

(a) 16 Ves. 454.

(b) 2 Phill. 471.

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to apply to Parliament for further powers, or for additional funds for making further experiments].

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

I need not hear a reply, for I am clear that the Plaintiff's counsel are entitled to the relief they have asked.

Of course they do not ask, in such a case as this, that the Court should immediately interfere to stop up the main sewers already made by the Defendants; but what they ask is, that, the rights of their clients being ascertained, there should be some arrangement made,—some security given,—that, between this time and the hearing, or within some reasonable and proper time, the Defendants, knowing their legal position, will take steps to prevent the nuisance of which the Plaintiff complains.

That the Defendants should know in some degree the legal position in which they are placed, appears to me most desirable; for the extreme proposition contended for by their counsel has struck me, I confess, as being one of remarkable novelty.

It has been urged upon me more than once during the argument by the counsel for the Defendants, that there are 250,000 inhabitants in the town of *Birmingham*, and that this circumstance must be taken into consideration in determining the question of the Plaintiff's right to an injunction.

I say the Plaintiff's right, rather than the rights of those other members of the community on whose behalf the information is exhibited, because, as regards the latter, there

may be circumstances to be taken into consideration which do not affect the question so far as it regards the Plaintiff. There are cases at law in which it has been held, that, where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience to the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and if so, whether the Court, looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them.

Now, with regard to the question of the Plaintiff's right to an injunction, it appears to me, that, so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. The rights of the Plaintiff must be measured precisely as they have been left by the Legislature. I am not sitting here as a committee for public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to *Birmingham* only, but to the whole of *England*,—that is not my function. My function is only to interpret what the Legislature (the proper body to which all such arguments should be addressed) has considered necessary for the town of *Birmingham*. The town of *Birmingham* is to have neither more nor less than the Legislature has thought necessary for its protection. The Plaintiff's rights are neither more nor less than the Legislature has thought it proper to leave him. And the question, whether the town of *Birmingham* is concerned, or whether, as in the case of *Delarue v. The Aldershot Deodorizing Manure Company*, the Defendants are carrying on these operations for

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their own profit, is one which it is entirely beside the purpose to argue in this Court.

Now, the Plaintiff's rights are these:—He has a clear right to enjoy the river, which, before the Defendants' operations, flowed unpolluted—or, at all events, so far unpolluted that fish could live in the stream and cattle would drink of it,—through his grounds, for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish, which were accustomed to frequent it, may not be driven elsewhere. He is entitled to the full use and benefit of the water of the river just as he enjoyed them before the passing of the Municipal Act, unless there be in that Act something which says he is not to enjoy them any longer. That is the only question I have to try, and when I have tried that question I arrive at the measure of the rights of both parties.

As regards the discretion the Court should exercise where such rights exist; if the Plaintiff finds the river so polluted as to be a continuous injury to him,—if, in order to assert his right, he would be obliged to bring a series of actions, one every day of his life, in respect of every additional injury to his cattle, or every additional annoyance to himself (not to mention the permanent injury which he would sustain in having the water,—which, as it passes along the course of his land, is his property,—so damaged that he cannot use it), then the Court will properly exercise its discretion by granting an injunction, to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual and daily annoyance entitles him.

In one respect, it is true arguments as to the discretion

which the Court should exercise in a case like the present, may very properly be addressed to it, viz. that before granting an injunction compelling the sudden stoppage of works like these, inasmuch as such an injunction might produce a considerable injury, the Court, by way of indulgence, would afford the Defendants every conceivable facility to enable them to remedy the evil complained of. But when I am told that they have already done their utmost and spent all their money in endeavouring to remedy that evil, and that now, in order to discharge the duties which the Act has imposed upon them, they have no alternative but to override the rights of private individuals, the answer is this:—If they have not funds enough to make further experiments, they must apply to Parliament for power to raise more money. If, after all possible experiments, they cannot drain *Birmingham* without invading the Plaintiff's private rights, they must apply to Parliament for power to invade his rights; and if the case be one of such magnitude as it is represented to be, Parliament, no doubt, will take measures accordingly, and the Plaintiff will protect himself as best he may.

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As regards the Plaintiff's rights, therefore, the only question I have to consider is, whether the nuisance has been created by the act of the Defendants; and I cannot hesitate to say that it has. It was argued, that the inhabitants of *Birmingham* had a right to drain their houses into the *Rea*, and thence into the *Tame*; but this at least is in evidence, that the alleged right as exercised (assuming it to be a right) did not pollute the water of the *Tame* as it does now—did not kill the fish or prevent cattle from drinking of the river; but immediately the Defendants' sewers were opened the fish were killed in the river, and cattle would no longer drink of it; and there cause and effect are clearly pointed out.

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The same sort of argument was addressed to me in the *Luton case*(a). There it was contended, and, in fact, the Plaintiff admitted, that the inhabitants had a right to open their sewers into the river; and the Defendants, acting on behalf of the community, claimed to exercise all the rights which its several members possessed. But the answer is this:—The right thus claimed is like that which exists in the case of adjoining mines upon different levels. From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of an adjoining mine upon a higher level descend upon his mine so long as it descends in the natural course of drainage; but that does not entitle the owner of the adjoining mine to throw upon him in some other and more objectionable way water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property. So here, before the Defendants' operations, the drainage of *Birmingham*, entering the river in driblets and at different parts of the stream, was largely diluted before it reached the Plaintiff's property, and did not subject him to that inconvenience of which he now complains.

I have now to look to the Act of Parliament, and consider whether the Legislature have given the Defendants power to interfere with the river in the manner complained of by the Plaintiff. Now, independently of the proviso in the 24th section of the General Act(b), that what the Act requires to be done must be so done that the same shall in no case become a nuisance, the 107th section has been pointed out to me, which enacts "that nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this

(a) *The Attorney-General v. Health*, 2 Jur., N. S., 180.
The Luton Local Board of (b) 10 & 11 Vict. c. 34.

Act would be, deemed to be a nuisance at common law." It was argued on behalf of the Defendants that this section must be read as amounting merely to a direction that all nuisances at common law are to be left to Courts of common law to punish. But that is not my interpretation of the section. The 24th section was plainly intended as saving to every person all his rights in respect of acts or omissions, which, independently of the Act, would be a nuisance. Nothing done under the Act, and which would be a nuisance at common law, is to be deemed authorised by the Act. If it be a nuisance at common law, the rights of the party injured are unaffected by the Act. The jurisdiction of this Court is founded upon the existence of a right at common law, which right can only be exercised at law by means of an indefinite series of actions, which the Court supersedes by at once stopping the whole mischief complained of. It is, therefore, clear, that nothing in this Act contained has given the Defendants any right so to interfere with the river as to produce the nuisance of which the Plaintiff complains. It is true, they are compelled by the Act thoroughly to drain the town; but they are also compelled so to drain it as to bring themselves within the provisions of the Act, which says that it shall not be lawful for them to do anything which at common law would be deemed to be a nuisance. How the town is to be thoroughly drained without causing a nuisance, is the business of the Defendants to discover. It is no business of the Plaintiff; and if it should prove an impossibility, the argument does but come back to the same point: the town must remain undrained, unless the Defendants obtain another Act of Parliament, enabling them to do that which at present the law will not allow.

It was argued, that the Plaintiff is precluded from making this application by his own delay,—which, if unexplained, would have struck me at once as an objection,

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seeing that the system of drainage, of which he now complains, was devised, and partly executed, as long ago as the year 1854. In October, 1854, the Plaintiff and others wrote to the Defendants, complaining of the injury to which they were then subjected by the Defendants' operations. But what is the answer to that application? [The Vice-Chancellor read the surveyor's letter of November, 1854.] In that state of things I cannot impute any laches to the Plaintiff. After the representations in that letter, he could not have come here to restrain the Defendants from making the works without waiting to see whether they would comply with the Act of Parliament (as he was bound of course to suppose that they would do), and take care that when the sewage was discharged into the *Tame*, it should be either deodorized, or otherwise restored to a comparatively pure state, as they had promised in their surveyor's letter.

In this respect, and at this stage of the proceedings, the case resembles one which was originally before me, but was afterwards transferred to the Master of the Rolls—that of *The Manchester, Sheffield, and Lincolnshire Railway Company v. The Workop Board of Health* (a). There the Defendants had made a main sewer opening into the Plaintiff's canal, and, further—and this was certainly a most suspicious circumstance—they had laid a series of pipes leading from all the houses of the town towards this main sewer, but ending in blind holes. At the same time, they had always told the Plaintiffs that they had no intention to drain the sewage from the houses by means of those pipes, but only the natural water. At last, two of the pipes were opened into the canal. Still the Defendants said, they were going to have a grand scheme of drainage, and when that scheme was complete, the sewage would not go into the canal. In this state of things, when the case came

(a) 23 Beav. 198.

before me, I thought I was bound to take their word that they did not intend to do so, and, accordingly, I put them under an undertaking not to open any side sewer or other sewer into the main sewer; and, that undertaking being given, I ordered the cause to stand over, with liberty for the Plaintiffs to bring such action as they might be advised, and liberty for either party to apply. No action was brought. The cause was transferred to the Master of the Rolls; and when it came on to be heard, the Master of the Rolls felt the same difficulty which I had felt, the act not being yet done, and the question being whether it would be a nuisance in case the act were done. He says:—"I think it is impossible for this Court to grant a mandatory injunction to compel the Defendants to undo all the works, which, as they allege, are absolutely necessary to a plan they will have to form for the drainage of this district under the duties imposed upon them by the Legislature, and by which they will, as they allege, carefully guard against the evil apprehended by the Plaintiffs. If it should hereafter appear that the Defendants are not acting *bonâ fide*—that their assertions are devoid of truth—this Court must deal with them as it best can; but, at present, I am of opinion, that this Court must give faith to the solemn and repeated assertions that they do not intend to inflict this injury on the Plaintiffs"^(a). And although he ended by granting an injunction as to sewers already opened, or to be opened, into the main sewer, so long as the latter should discharge itself into the Plaintiff's canal, he did not otherwise interfere with the works which had occasioned apprehension to the Plaintiffs. He felt it doubtful whether the Plaintiffs had acquired any right to interfere at all. Except for the opening of the two drains, they would never have acquired such a right, but would have been bound to stand by, and let all those suspicious operations proceed, trusting to the Defendants' assurance

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(a) 23 Beav. 207, 208.

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that they had no intention of creating a nuisance. So, in the case now before me, the Defendants having assured the Plaintiff, that, eventually, their operations will not create the nuisance of which he complains, the Plaintiff was not bound to interfere earlier. He continues to put faith in their assurance, that they are *bonâ fide* attempting to remove the nuisance, until at last, finding that has not been achieved, he comes here to have his rights protected.

Thus far I have confined myself to the case of the Plaintiff, as being the most plain and simple; but, as regards the general body of persons—inhabitants of houses adjoining the course of the river—on whose behalf the information is exhibited, it appears to me, that, as regards those persons also, some degree of nuisance is shown by the evidence to have been caused by the same operations on the part of the Defendants. If I were called upon immediately to interpose by some violent interference (if I may so term it) I might take more time to consider how far a nuisance of this kind has been established; but I think it is established by the evidence of numerous medical men, that the diseases engendered by the nuisance of the river have been seriously aggravated. That evidence is not contradicted. In fact, it is almost an undisputed case; for the borough of *Birmingham* very properly do not pretend to deny that the evil complained of is what in common parlance would be called (whatever it might be at law) a very considerable nuisance.

Before I conclude, I should notice the arguments that were addressed to me on the part of the Defendants, as to the form of the decree which would have to be made in the suit, should it ever be brought to a hearing. Those arguments, if allowed to prevail, would quash the whole jurisdiction which the Court exercises by way of injunction. It was said, that the Court cannot make an order

for the removal of a nuisance; because, who is to tell upon a motion to commit for an alleged breach of the injunction, whether the nuisance has been removed or not? Now, whatever difficulty there may be in determining that question, it is one which does not prevent Courts of law, as I know from my own experience, from dealing with analogous matters by indictment and judgment in cases of nuisance. And the difficulty, after all, amounts only to this, that the Court cannot determine what steps are to be taken in order to remove the nuisance. But to that the answer is, that it is not the province of the Court any more than it is of the Plaintiff, to determine what steps are to be taken to remove the nuisance. That is entirely the province of the Defendants. They need not be alarmed lest the Court, if it entertains cases of this description, should be tempted to embark in scientific inquiries. All I say is, that if the Defendants will not find some way of removing the nuisance, the Court, when the time comes, will say, "You shall not let the sewage out into the river," and that will be a very effective way of stopping the whole evil. By way of indulgence, the Court would afford them every possible opportunity of discovering the best means of escaping from such a calamity as they apprehend from such an order. But the argument I have heard, as to the impossibility of working out such an order upon motion to commit, would be equally applicable to every order this Court has made in cases of nuisance, whether by brick-burning or otherwise. The question, whether the evil is diminished to the full extent required or not, is a question which in all such cases must be tried upon motion to commit; and, if the Court finds that, after all, the evil continues, and that no means can be contrived for its removal, it orders the Defendants to abate the nuisance altogether.

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restrain the Defendants from opening any additional main or branch public sewer into either of the main sewers; and, it seems to me, that there should be, further, an undertaking forthwith to take such steps as may be deemed necessary and proper, due time being allowed for the purpose, to prevent the continuance of the nuisance complained of in the bill—that is to say, to prevent the pollution of the river *Tame*, so as to render it injurious to the inhabitants of the houses adjoining its course, and also to prevent its being so polluted as to become offensive and unfit for use, with reference to the Plaintiff, where it passes through the grounds of the Plaintiff. Those are the two things to be arrived at. The Plaintiff is entitled to rather larger rights than the public. The public have only to look to their health.

Some discussion arose as to the difficulty of the Defendants' entering into any undertaking, and eventually the order was made in the following form:—

Minute of
 Order.

INJUNCTION to restrain the Defendants from opening any additional main or branch public sewer into either of the main sewers in the bill and information and affidavits mentioned, until further order. Liberty for either party to apply. In the event of the Defendants not proceeding forthwith to take such steps as may be necessary and proper (due time being allowed for that purpose) to prevent the continuance of the nuisance complained of by the information and bill (that is to say), to prevent the pollution of the river *Tame*, so as to render it injurious to the health of the inhabitants of the houses adjoining its course, and also to prevent its being so polluted as to become offensive and unfit for use or injurious to health where it passes through the grounds of the Plaintiff and Relator,—the Informant and Plaintiff to be at liberty to apply on the first day of Michaelmas Term for an extension of the injunction.

1858.

IN RE THE ATHENÆUM LIFE ASSURANCE
SOCIETY;

July 7th & 9th.

EX PARTE THE EAGLE INSURANCE COMPANY.

ON the 6th of July, 1852, *The Mentor Life Assurance Company* granted a policy of assurance on the life of a foreigner named *Sahlin* for 2000*l.*, payable to his executors on his death.

Joint Stock Company—Deed of Settlement—Directors—Contract by, not under Seal—7 & 8 Vict. c. 110, s. 44—Limited Agency.

The Mentor Company proposed to *The Athenæum Life Assurance Society* (which was a joint stock company registered under the Act 7 & 8 Vict. c. 110) to reassure this policy with *The Athenæum Society*; and a resolution was passed at a board of the directors of *The Athenæum Society* authorising an assurance for that purpose for a larger amount.

The deed of settlement of an insurance society, registered under 7 & 8 Vict. c. 110, after empowering the directors to effect insurances on lives upon such terms and conditions and in such manner as they should

On the 16th of July, the following memorandum, indorsed on a copy of the policy which had been granted by

think proper, provided that every policy or other instrument required in any of the transactions aforesaid should be given under the hands of not less than three of the directors, and sealed with the common seal of the society; and that there should be contained therein, and in every other contract to be entered into on behalf of the society in or about the premises (meaning in or about matters connected with insurance), a reference to the deed and a proviso negating an unconditional liability. The deed also declared, that it should be competent to a board of directors to exercise certain general powers, and generally where the deed was silent or did not otherwise provide, to act in the direction of the affairs of the society in such manner as in their absolute discretion they should think most conducive to its interests:—*Held*, that a memorandum signed by three of the directors, but not under the seal of the society, stipulating, that, on payment of certain premiums, the society would guarantee an assurance therein mentioned, and would issue, when required, a stamped policy in the form authorised by their deed of settlement, was binding upon the general body of the shareholders, and created a good equitable debt.

State of the law as to the liability of persons dealing with companies registered under the Act 7 & 8 Vict. c. 110, to make themselves acquainted with the company's deed of settlement, and to see that its requirements are complied with.

Acquiescence.—Evidence required, in the case of joint stock companies, before the Court will conclude that an act of the directors not authorised by the company's deed of settlement has been acquiesced in by the shareholders.

1858.
 IN RE
 ATHENÆUM
 SOCIETY;
 EX PARTE
 EAGLE
 COMPANY.
 —
Statement.

The Mentor Company, was signed by three of the directors of *The Athenæum Society*:—

“Memorandum—*Athenæum Life Assurance Society*—*The Athenæum Life Assurance Society* guarantee *The Mentor Life Assurance Company* the whole of the within assurance on the same terms and conditions at a premium of 33*l.* 5*s.*, payable half-yearly, on the 16th day of January and 16th day of July, or within thirty days thereafter; and will issue, whenever required, a stamped policy numbered 327, in favor of *The Mentor*, on payment of stamp duty.”

The premiums were duly paid by *The Mentor* to *The Athenæum*, until the death of *Sahlin* in 1856.

In the meantime *The Mentor Company* had assigned their business and all their risks, and among them the policy on the life of the deceased, and all their right under the memorandum, to *The Eagle Assurance Company*; which paid the sum assured by *The Mentor* policy on the 26th of December, 1856.

An order having been made for winding up *The Athenæum Society*, a claim was brought in by Messrs. *Holcombe, Lloyd, and Price* as trustees of *The Eagle Insurance Company*, to prove against the estate of *The Athenæum* for the 2000*l.* and interest from the 26th of December, 1856, when the same was paid by their company.

The 27th section of the deed of settlement of the *Athenæum Society* was as follows:—“It shall be lawful for the directors of the society to effect assurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other assurances, whether life, guardian, guarantee, or otherwise, upon such terms and

conditions, and in such manner, as the directors shall think proper."

The 28th section provided thus:—"That every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society; and that there shall be contained therein, and in every other contract to be entered into on behalf of the society in or about the premises" (meaning in or about matters connected with insurance), "a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereafter contained shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability."

The 38th section declared, that it should be competent to a board of directors to exercise certain general powers; "and generally, where the deed was silent or did not otherwise provide, to act in the direction of the affairs of the society in such manner as in their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters, and things whatsoever, as might be requisite or expedient in that behalf"

It appeared that the form of policy on which the memorandum was indorsed contained a proviso, to the effect indicated in the 28th section of the deed of settlement of *The Athenæum*, by the words "a proviso limiting the scope of the contract, so that it shall take effect and be satisfied only out of the then available assets of the society."

1858.

IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.

Statement.

1858.
 IN RE
 ATHENÆUM
 SOCIETY;
 EX PARTE
 EAGLE
 COMPANY.
 —
Argument.

The hearing of the claim having been adjourned into Court,

Mr. *James*, Q. C., and Mr. *T. Stevens*, on behalf of *The Eagle Company*, now moved that the trustees of that company might be admitted to prove against the estate of *The Athenæum Society* for the principal money and interest referred to in the memorandum of the 16th of July, 1852.

The contract contained in that memorandum was authorised by a board of directors, and signed by three of that body. It was an act within the scope of the ordinary business of the society, viz. to issue policies in the precise form stipulated for in the memorandum; and there was nothing in the Joint Stock Companies Act^(a), under which the society was registered, to render the seal of the company indispensable to the validity of such a contract. The 44th section of the Act merely provided, that, in the absence of the company's seal, the contract should be void, "except as against the company on whose behalf the same shall have been made."

It was essential to the transactions of fire and life insurance companies, that executory contracts of this kind should be upheld, the most important insurances in many of such companies necessarily remaining incomplete for days.

[They also contended, that, even if the memorandum were not binding upon the company, the society having received premiums from 1852 to 1856, upon the faith of the memorandum as being a valid contract, the memorandum must be deemed to have been ratified by the general body of the shareholders, citing *Reuter v. The Electric Telegraph*

(a) 7 & 8 Vict. c. 110.

Company (a). They cited also *Ricketts v. Bennett* (b), *Bosanquet v. Shortridge* (c), and *In Re The Norwich Yarn Company* (d).]

Mr. Rolt, Q.C., Mr. W. D. Lewis, and Mr. Field, for the official manager of *The Athenæum Society*, contra.

1858.
IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.
Argument.

The question was not whether the Act of Parliament required an instrument under the seal of the society, but whether such an instrument was not required by the society's deed of settlement; and upon that question the 28th section of the deed was conclusive that it was. That *The Mentor Company* were bound to look to the deed, and to see whether the deed empowered the directors to bind the company by a contract not under the common seal of the society, is clear upon the broad principle of the law of agency, that, wherever an authority purports to be derived from a written instrument, the other party is bound to examine the instrument itself, to see whether it justifies the act of the agent (e): *Alexander v. Mackenzie* (f). Besides, the precise point has been repeatedly decided in the case of joint stock companies registered under this Act: *The Royal British Bank v. Turquand* (g), and *Ernest v. Nicholls* (h).

The contrary contention gives to the unsealed and imperfect instrument a greater efficacy than to one under the seal of the company, and would lead to this result, that an insurance company might conduct the whole of their business without using a single sealed policy.

Mr. James, Q.C., in reply—

(a) 6 Ell. & Bl. 341.

(b) 4 C. B. 686.

(c) 4 Exch. 699.

(d) 13 Beav. 426.

(e) Story on Agency, § 76.

(f) 6 C. B. 766.

(g) 6 Ell. & Bl. 327.

(h) 6 H. L. C. 401.

1858.

IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.

Argument.

The 28th section of the deed distinguishes between executed and executory contracts. The former must be under the company's seal, the latter need not. The memorandum in question is of the latter description, and was clearly authorised by the general powers given to the directors by the 38th section of the deed of settlement. To accept proposals, must be within the business of the directors of an insurance company. The argument, that, according to this view, they might conduct the whole of their business without issuing a single sealed policy is incorrect, for, without such a policy, there could be no remedy at law.

[*The British Empire Life Assurance Company v. Browne*(a) was cited as to the question whether such a contract would not be unilateral.]

Judgment reserved.

July 9th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether *The Eagle Assurance Company* should be admitted to prove a debt in respect of a memorandum of this description. The *Mentor Life Assurance Company* had insured the life of a foreigner by a policy, in the same form and subject to the same conditions as the policies which the *Athenæum Society* was in the habit of granting under the powers contained in its deed of settlement. And, upon a copy of that policy was indorsed, and signed by three of the directors of the *Athenæum*, a memorandum referring to the policy, and stipulating in effect, that, on payment of

(a) 12 C. B. 723.

certain premiums, the *Athenæum* would hold itself responsible for the sum to be paid to the assured, and would issue to the *Mentor* (now represented by the present claimants) a policy "on the same terms and conditions" (meaning evidently "the same terms and conditions mutatis mutandis," for it is absurd to suppose that the *Athenæum* meant to contract to pay the sum in question out of the capital of the *Mentor Company*) "as the policy granted by the *Mentor*"—that is, in effect, to issue to the *Mentor* a policy in the ordinary form employed by the *Athenæum Society* under the powers of their deed.

1858.
IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.
Judgment.

The question, therefore, is simply whether, under the provisions of the Act of Parliament under which the *Athenæum Society* was registered (a), and of the deed of settlement of that society, such an instrument, not being under the common seal of the society, gives any right either at law or in equity to persons in the position of the present claimants.

Now, the Act of Parliament merely enacts, that, in the case of all joint stock companies completely registered under the Act, every contract entered into on behalf of the company, with certain immaterial exceptions, shall be in writing, and signed by two at least of the directors of the company, and sealed with the common seal; and if not so executed, "any such contract shall be void and ineffectual (except as against the company, on whose behalf the same shall have been made)." The precise intention of the Legislature in making that exception is not certain; but I apprehend their meaning to have been, that, as it was desirable that all contracts by such companies should be executed as there mentioned, the best mode of effecting that object was to provide, that, unless they chose by their deed to make special provision to the contrary, all contracts

(a) 7 & 8 Vict. c. 110.

1858.
 IN RE
 ATHENÆUM
 SOCIETY;
 EX PARTE
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 —
Judgment.

entered into on their behalf and not executed as required by the Act should be unilateral—good against the company, but void against all other persons.

Then, as regards the deed, the only clauses in the deed that are applicable to this subject are the 27th, the 28th, and the 38th.

[The VICE-CHANCELLOR read the 27th and 28th sections.]

Now, in the 28th section, two things are clearly provided: *First*, every policy, endowment, grant of annuity, or other instrument required in the transactions previously mentioned in the deed, is to be under the hands of three of the directors, and sealed with the common seal of the society. *Secondly*, there is to be contained therein, *and in every other contract* to be entered into on behalf of the society in or about the premises, a reference to the deed, and a proviso limiting the scope of the contract, so that it shall take effect and be satisfied only out of the then available assets of the society—a proviso which is actually inserted in the policy before me upon which the memorandum now in question is indorsed. The latter condition, therefore, is fulfilled by the contract contained in the memorandum; and the only question is, whether that contract is necessarily within the scope of the previous clause:—"Every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society."

Looking at the two branches of the clause, I think, that, even if the matter rested here, there would be strong ground for adopting the construction contended for on behalf of the present claimants, viz. that the first branch, which requires that every policy, endowment, grant of annuity, or other

instrument, should be given under the hands of not less than three of the directors, and sealed with the common seal of the society, relates to the completed instrument; and that, inasmuch as the second branch contains no such requisition, in reference to what it describes as "every *other* contract to be entered into on behalf of the society in or about the premises" (meaning in or about matters connected with insurance, such matters forming the principal subject of the earlier part of the deed), it would be competent to the directors, without violating that clause of the deed, to enter into a contract, which would have to be satisfied out of the funds of the society, but which would not have to be executed in the manner required by the earlier branch of the clause.

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 IN RE
 ATHENÆUM
 SOCIETY;
 EX PARTE
 EAGLE
 COMPANY.
 Judgment.

But when I come to the 38th clause—the only other passage in the deed having a bearing upon the question of the powers of the directors in reference to transactions of this nature—I find a provision, which, taken with the former, appears to me to be conclusive. That clause provides, that it shall be competent to the board of directors to exercise certain general powers, "and generally, where the deed is silent, or does not otherwise provide, to act in the direction of the concerns of the society in such manner as in their absolute discretion they shall think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters, and things whatsoever, as may be requisite or expedient in that behalf—the word "deeds," meaning, of course, not formal instruments, but such things as may be necessary. Now, looking to the general powers there given to the directors, and taking them in connexion with the provision in the 28th clause, that there may be other contracts requiring to be satisfied out of the assets of the society besides formal instruments under the seal of the society, it is not unreasonable to hold that this society, through the medium

1858.
IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.

Judgment.

of its directors, may contract, so as to bind itself to specific performance of agreements to issue policies, which, when issued, must be executed under the common seal of the society.

It was argued, that, to hold the memorandum in question to be thus binding upon the society, would be to give to an imperfect instrument a greater effect than to a complete and perfect instrument. But that is not so. It appears to me that the case is analogous to that of a power of attorney given to a solicitor to sell his client's estate, and to execute all deeds necessary for making a valid conveyance. The conveyance in such a case would not be effected without a formal instrument under seal; but the absence of such an instrument would not prevent a purchaser from obtaining a decree for specific performance of an agreement not under seal for the sale of the estate. So here, the policy cannot be effected so as to be binding at law without a formal instrument executed under the seal of the society; but that does not prevent persons, who had power under the deed to contract to issue a policy so executed, from contracting by an instrument not under the seal of the company in such a manner that in this Court the company would be bound and the contract capable of being enforced. The question is simply this, whether these directors had expressly or by implication a power thus to contract; if they had, then I am justified in holding that the company would be bound, upon a bill filed by the present claimants, to execute a policy in conformity with the contract the directors have entered into on behalf of those through whom they claim.

A question might arise under the 38th clause of the deed, as to whether what the directors are there authorised to do under their general powers must not be done by them at a board; and it appears to me that it would not be com-

petent to any one, two, or even three directors, by putting their signature to an instrument, to enter into a contract for the society; for, by the 38th section, the contract must be executed at a board; but in this case that objection is removed by the circumstance, that a contract to insure a larger sum than that mentioned in the memorandum was authorised by a resolution of a board, and that resolution would authorise the smaller engagement entered into by the memorandum.

1858.
IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.
Judgment.

I entirely concur with the observations of Lord *Wensleydale* in the case of *Ernest v. Nicholls*(*a*), when applied to the subject matter then before the Court. It is most important, as is there said, that persons dealing with companies registered under this Act of Parliament(*b*), should know that they are dealing with a company with whose deed of settlement they are bound to make themselves fully acquainted, and whenever the deed requires any particular description of contract to be executed in a particular form, they must see that it is executed in that particular form; the case being one of a limited agency, in which the powers given by the general body of proprietors must be exercised *modo et formâ* as required by the deed. Considering the immense powers of directors of joint stock companies, the very small control the shareholders have over them, and the scanty information contained in the directors' reports, it is important that the shareholders should not be held bound by the directors' acts one step beyond the provisions to which they have assented by their deed of settlement. I do not think it at all an unreasonable requisition on the part of joint stock companies, that every instrument required in their transactions should be under their common seal. The 44th section of the Act makes such a requisition of the utmost importance; for, according to that section, every contract entered into by

(*a*) 6 H. L. C. 401.

(*b*) 7 & 8 Vict. c. 110.

1858.
 IN RE
 ATHENÆUM
 SOCIETY;
 EX PARTE
 EAGLE
 COMPANY.
 —
Judgment.

an instrument not under their common seal would be unilateral as regards them—a contract under which they would be liable, but of which they could not claim the benefit against those with whom it was entered into. In this particular case, indeed, that consideration has less weight, regard being had to the nature of a contract for insurance, which is merely a contract for renewal from year to year, the premium being first paid before every such renewal, so as to leave no right to be enforced by the company against the party with whom they are contracting; but there might be other contracts to be entered into by a society of this description, as to which it would be of the utmost importance to the general body of shareholders, that they should not be bound by their acts unless executed in conformity with the requisitions for which they have stipulated.

What Lord *Wensleydale* says is this:—"Provisions which give to the directors discretionary powers of management do not affect strangers. The company is bound by the exercise of the discretion which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers; but they form the subject of an action against the directors for the breach of their covenants expressed or implied in the deed. The great body of shareholders, for whose protection these limitations of authority are provided, cannot be affected unless they are complied with. They can only act and contract through their directors, and the acts of individual shareholders have no effect whatever on the company at large"^(a).

There is, no doubt, an important distinction to be drawn, and it is drawn in the case of *The Royal British Bank v. Turquand*^(b), between that which, upon the face of it, is

^(a) 6 H. L. C. 419.

^(b) 6 Ell. & Bl. 327.

manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. Thus, where the deed requires certain instruments to be under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company—for instance, resolutions at meetings, and the like,—if the party contracting, with the directors find the acts which they undertake to do to be within the scope of their powers under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed, or the like, otherwise he would be bound to go further back, and to inquire whether the meetings have been duly summoned, and to ascertain a variety of other matters, into which if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed.

After making the observation I have read, Lord *Wensleydale* proceeds to comment upon a case which occurred at law, that of *Smith v. The Hull Plate Glass Company*(a), and then he says this:—"If there had been a special verdict, unless it had been stated that all the directors, or that a board of directors, saw and sanctioned the purchase of each article, it would not have been sufficient to fix the company, unless the reasoning of *Maule, J.*(b), is correct, that, if the directors carried on the business, and allowed persons to act for them on the premises in ordering and receiving goods, the company at large would be fixed, as an ordinary partnership would be under the same circum-

(a) 8 C. B. 668; 11 Id. 897.

(b) 11 C. B. 928.

1858.
IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.
Judgment.

1858.
IN RE
ATHENÆUM
SOCIETY:
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stances. No doubt, this position is quite correct, if the directors are expressly or impliedly authorised by the deed, which depends upon the terms of it, to do so"(a).

So that he distinctly recognises the principle, that, whatever power you can collect from the company's deed to be either expressly or by implication vested in the directors, that power a person contracting with the directors is entitled to assume to be well exercised by them in his behalf.

In the case before me, I find, in the deed of this society, the 28th section distinguishing between certain completed instruments, which it requires to be under the common seal of the society, and other contracts, which, like the former, are to be satisfied out of the funds of the society, but as to which there is no such requisition with reference to the manner in which they are to be executed. I find, in the 38th section, a power given to the directors, wherever the deed is silent, to do everything which is necessary for carrying on the business of the company; and I then find a contract, executed by three of the directors, which is a reasonable contract and within the precise scope and object of the society, viz. a contract to issue a policy in the very form which the society was constituted for the purpose of issuing. Under these circumstances, it appears to me, that the contract in question is one into which the directors were authorised to enter, and which, upon bill filed, the society would have been decreed to perform.

I, therefore, hold that the debt is established,—if not at law,—as a good equitable debt.

Upon the circumstances relied on in argument, for the purpose of showing that the memorandum had been actu-

(a) 6 H. L. C. 421.

ally ratified by the shareholders, I purposely abstain from commenting. Much might be said on that part of the case in reference to the peculiar constitution of joint stock companies, which differ considerably from chartered companies, such as that in question in *Reuter v. The Electric Telegraph Company*(a); and, unless I know what information was laid before the shareholders, what powers of inspection they possessed, and what information they were capable of obtaining with reference to the transaction in question, I should have to pause before I could arrive at the conclusion, that, if this act were one not authorised by the deed of settlement of the society, the shareholders could be said to have acquiesced in its being done, unless notice, distinct and clear, were brought home to them in the shape of a report, that the memorandum had been signed on their behalf.

1858.

IN RE
ATHENÆUM
SOCIETY;
EX PARTE
EAGLE
COMPANY.

Judgment.

ORDER, that Messrs. *Holcombe, Lloyd, and Price*, as trustees of *The Eagle Insurance Company*, be admitted to prove against the estate of *The Athenæum Insurance Society* for the sum of 2000*l.*, with interest thereon from the 26th of December, 1856, as if a policy had been granted in the terms authorised by the deed of settlement of the last-named society.

Minute of
Decree.

(a) 6 Ell. & Bl. 341.

1858.

June 3rd & 4th. MARY BATHE, the Wife of JOHN BATHE, }
 formerly of *New Zealand*, and now out of }
 the Jurisdiction, suing as a Feme Sole by } *Plaintiff.*
 virtue of the Provisions contained in the }
 Act 20 & 21 VICT. c. 85 - - - }

AND

THE GOVERNOR AND COMPANY OF }
 THE BANK OF ENGLAND - - - } *Defendants.*

Feme Covert
Executrix—De-
sertion by Hus-
band—Order
of Protection
under 20 & 21
Vict. c. 85, s. 21
—Construction
of s. 26—
Power to sue
alone—Costs.

A married woman, deserted by her husband, was left executrix and residuary legatee under a will; after proving which, she obtained from a magistrate, under the 21st section of the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85) an order for the protection of her property:—*Held*, that she was entitled to transfer Consols standing in the name of her testatrix in the books of the Bank of *England*, and to receive dividends thereon, as if she were a feme sole.

And, *semble*, the same rule would have applied if she had been merely executrix, without taking any beneficial interest under the will (*b*).

Rule as to costs where the Bank of *England* is a Defendant.

(a) 20 & 21 Vict. c. 85.

(b) Vide *infra*, p. 578, note.



of any property which she might acquire by her own industry, and any money and property which she had become possessed of after such desertion, or might become possessed of, against her husband and his creditors, or any person claiming under her husband.

1858.
BATH
v.
THE BANK OF
ENGLAND.
Statement.

The Bank of *England* having refused to allow the Plaintiff in the absence of her husband to transfer a sum of 220*l.* Consols standing in the name of the testatrix in the books of the Bank, or to receive the arrears of dividends thereon, the Plaintiff now filed her bill against the Bank to have it declared that she was entitled to sell and transfer the stock, and to receive the dividends thereon, in the absence and without the concurrence of her husband, and as if she were a feme sole ; and for an order against the Defendants accordingly.

The Defendants by their answer submitted that the case was not within the provisions of the Act, which applied only to property in which a married woman had a beneficial interest, and not to property held by her as a trustee.

Mr. *James*, Q. C., and Mr. *J. Sidney Smith*, for the Plaintiff, contended that she was entitled to a decree as prayed—

Argument.

First, upon the broad ground, that the provisions of the Act applied to all property, whether the wife had a beneficial interest therein, or whether it were held by her merely in autre droit, and as a bare trustee. Besides the provisions in the 21st and 25th sections, the 26th section of the Act provides, that in every case of a judicial separation (and, by the 21st section, the Plaintiff, having obtained an order of protection, was, during the desertion, to be deemed in the like position in all respects with regard to property and contracts, and suing and being sued, as she



1858.
 BATHE
 v.
 THE BANK OF
 ENGLAND.
 Argument.

would be under the Act if she had obtained a decree of judicial separation,) the wife shall be considered as a feme sole for the purposes of contract and suing and being sued in any civil proceedings, "and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her." Looking to those words, it is clear, that, in a case like the present, the old rule of law, which precludes a married woman from suing or being sued alone, is suspended. Under the old law, the husband, during the coverture, was liable upon *devastavit*; it was but just, therefore, that he should have the power over the property in respect of which he might be so made liable, and that the wife should not be able to do anything to his prejudice: *Russel's case* (a), *Taylor v. Allen* (b). But, by the 26th section, the husband is relieved from all liability in respect of any *devastavit* by the wife. The whole reason of the old rule of law, therefore, has ceased, and that being so the rule itself has ceased also. The wife can now be sued by any creditor or legatee under the will; the husband is relieved from all liability in respect of her acts, and, if so, it would be monstrous to allow him to interfere. The wife, having the liabilities of a feme sole, is entitled also to the rights of that position.

But, *secondly*, even if the Act applies only to property in which the wife has a beneficial interest, and would not apply if the Plaintiff were a bare trustee, in this particular case the wife is residuary legatee as well as executrix; and it cannot be contended that the mere circumstance of her beneficial interest being subject to the payment of debts, can prevent the application of the Act. Suppose this had been a case of a specific legacy, vesting immediately upon executor's assent.

(a) Rep. Part v. p. 27.

(b) 2 Atk. 213; and Wms. Executors, 202.

Mr. *Cotton*, in the absence of Mr. *Rolt*, Q. C., for the Bank of *England* :—

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None of the sections of the Act relied on by the Plaintiff entitle her as executrix to transfer the fund in question without the concurrence of her husband.

That the 21st section has not this effect is clear from the clause which provides, that, if the husband or any creditor or person claiming under him should seize or continue to hold any property of the wife after notice of the order of protection, he shall be liable to restore the specific property, and also for a sum equal to double the value of the property so seized or held—a proviso which clearly shows that the property protected by that section is property in which the wife has a beneficial interest, and not, as here, property to which she is entitled in an administrative capacity as executrix or trustee; for, if so, to whom are these double damages to go? The accretion should go to the trust, not to the trustee.

Then, as to the 25th section, the proviso there contained, that, if the wife shall again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, shows again that the Legislature are dealing in that section, as in the former, with property capable of being settled to her separate use—that is, with property in which she is beneficially interested, and not with trust property.

And, as to the 26th section, the argument of the Plaintiff overlooks the distinction between dissolution of marriage and judicial separation. In the latter, the wife is, for a time, and for certain purposes, to be treated as a feme sole, but that is merely temporary; the unity of husband and wife is not dissolved, it exists merely during the separa-

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tion, and whenever the separation is put an end to, the husband's rights and liabilities revive, without any further ceremony.

Mr. *James*, Q. C., replied.

Judgment reserved.

June 4th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether a married woman, who has obtained from a magistrate, under the recent Divorce and Matrimonial Causes Act (*a*), an order of protection, whereby she is placed in the same position as if a judicial separation had been pronounced, in reference to the sections of the Act which I have to consider, is entitled, as executrix and residuary legatee under a will, to require a transfer from the Bank of *England* of stock standing in the name of the testatrix.

I may observe, that although the order for separation is dated since the will was proved, the desertion took place at a much earlier period, and the 25th section would relate back to that period by virtue of the words at the end of the 21st section, that the wife is to be and to be deemed to have been, during the desertion, in the same position as if she had obtained a judicial separation.

The question raised on the part of the Bank of *England* is, whether the clauses in the Act to which I shall refer are intended to apply to trust property. Perhaps, however, the argument of this question cannot be raised to the fullest extent on the present case, inasmuch as both the

(*a*) 20 & 21 Vict. c. 85, s. 21.

legal and beneficial interest is in the Plaintiff, she being not only executrix but also residuary legatee.

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The 21st section enacts, that a wife deserted by her husband may apply to a magistrate for an order to "protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him." The words "property she may become possessed of after such desertion," would include the property in question in this case, which has been acquired in the manner I have described. The section then goes on to provide that the magistrate, if satisfied of the fact of such desertion, and that it was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make an order protecting her earnings and property acquired since the commencement of the desertion, from her husband and all creditors and persons claiming under him; and such earnings and property shall belong to the wife as if she were a feme sole.

Further on in the same section there is the clause to which my attention was called in the argument on behalf of the Bank, that, if the husband or any of his creditors shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife to restore the specific property, and also for a sum equal to double the value of the property so seized or held after notice of the order. No doubt, as far as that portion of the section is concerned, the language has a marked reference to property which the wife may acquire in her own right; for, as it was very properly argued, it is scarcely conceivable that the Legislature could have intended the husband or his creditors to forfeit to the wife double the value of property held by her solely in autre droit, and in which she has herself no beneficial interest.

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Then, at the end of the 21st section, there is added a clause which certainly seems to introduce a totally separate provision. "If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." The reference there made to the position of a wife who has obtained a decree of judicial separation, carries us on to the 25th and 26th sections of the Act; and I apprehend the true construction of the 21st section is, that the protection which the earlier part of the section affords to a wife who has obtained the order of a magistrate is one thing, and the protection which the concluding part of the section affords her is another,—is something additional and over and above that species of protection which she acquires under the former clause. If that interpretation is correct, I am not embarrassed by any consideration, whether the earlier part of the section refers to trust property or not, because it is intended that some additional benefit should be conferred by the latter part of the section.

That additional benefit is to be found in the 25th and 26th sections.

The 25th section says:—"In every case of a judicial separation, the wife shall, from the date of the sentence," which is extended back by the operation of the 21st section to the date of the desertion, "and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her." Of course, as far as those words go, they carry every sort of property, trust or otherwise, "and such property may be disposed of by her in all respects as a feme sole; and,

on her decease, the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." That, it was argued for the Bank, points solely to property which the wife takes beneficially, there being no need to insert such a provision with reference to property of which she is possessed simply in an administrative or executorial capacity. The clause proceeds:—"Provided, that, if any such wife shall again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate." That, again, certainly points to property in which the wife has the beneficial interest.

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On the other hand, we must proceed to the next section, the 26th, which says:—"In every case of a judicial separation, the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as Plaintiff or Defendant."

Those words certainly point in a very marked manner to every description of wrongful act that can be done by the wife, whether in reference to property or to anything else. It would be difficult to contend, that, under those words, the husband, if sued in respect of a devastavit committed by his wife during the separation, would not be able to plead that he was exempted by the Act from all liability in respect of such wrongful acts on the part of his wife. And if so, the wife must, of course, possess the correlative right of having control over the property during the sepa-

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ration. It would be absurd to hold, that the wife is liable to be sued in respect of any devastavit committed during the separation, if she is not also the sole person entitled to interfere to protect the property.

As regards the old law in reference to this subject, it appears to me that the decisions in cases where the husband had abjured the realm have but little bearing on the question. Those cases were put upon their true ground by Lord Eldon, when Chief Justice of the Common Pleas, in *Marsh v. Hutchinson* (a), where he had occasion to comment upon some earlier decisions, which had allowed, as he thought, too great a latitude to married women as regards suing and being sued alone, extending the doctrine not merely to instances in which the husband had abjured the realm and cases of actual banishment, but also to cases in which the husband had been merely transported for a term of years, and others of a similar character.

The case of *Marsh v. Hutchinson* was the simple case of an *Englishman*, employed in the service of the *British* Government, and resident in *Holland*. Having lands there, upon the cessation of his employment, in consequence of war between the two countries, he sent his wife and family to this country, but continued to reside abroad himself; and it was held that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such. Lord Eldon says:—"Had the Defendant's husband been engaged in the service of Government only, it might have made a material difference in the case. The question, however, in the view of the law, may, perhaps, be reduced to this: whether, the Defendant's husband having been employed in *Holland* by the *British* Government, he has remained there after the cessation of that

(a) 2 Bos. & Pull. 226.

employment, merely to collect what the civilians call *summas rerum*, or with any further views? and yet, if it were clear that this man never intended to return to *England*, and might, therefore, be represented as incapable of being sued in this country, before we come to a conclusion upon the case, there are many considerations to be weighed. In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead; so she became entitled to the enjoyment and profits of her own land, though, if he had not been civilly dead, he would have been seised of the lands in her right: and, indeed, she might have sued for an assault in her own name, and might have been made a Defendant without her husband, in all cases in which the husband must otherwise have been joined. In those cases there is no difficulty; because the fiction of law, which considers the husband as civilly dead, puts the wife in the same situation as if he were actually dead." He then proceeds to refer to the various difficulties which might result from extending the same rule to cases of mere transportation in the event of the husband returning to *England*, and seems throughout to place the case of abjuration and positive banishment upon a totally different ground from any which it is material to consider in this case.

Lord *Eldon* took the same view, that the earlier authorities had gone too far with respect to married women suing and being sued alone in the case of *Pannell v. Taylor*(a); where, having first followed a case before Lord *Hardwicke*, in which he granted a writ of *ne exeat* against a married woman, an executrix, her husband not being a

(a) 1 Turn. & R. 96.

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party to the suit, he said, that when the older cases came to be sifted, the authority upon which Lord *Hardwicke* relied did not support his decision; and he reversed his own order, in which he had granted a writ of ne exeat.

A case which appears to me to have considerable bearing upon the construction of this Act of Parliament is that of *Innell v. Newman*(a). There the wife was an executrix, and had brought an action in the name of herself and her husband, as she was obliged to do, to recover certain property of her testator. It is not stated—possibly at law the question would not be very material—whether she was residuary legatee, or had any beneficial interest in the property when recovered. But the husband had given a release of the debt to the Defendant, and the motion was to set aside the release, on the ground that there had been an agreement entered into by deed between the husband and his wife, “whereby he agreed to allow her to enjoy as her distinct and separate estate and property all such effects whatsoever which she might thereafter purchase or acquire, or which, by any gift, grant, limitation, devise, bequest, descent, or representation, she, or *Innell*, his heirs, executors, or administrators, in her right should be entitled to, and that these should be enjoyed without any interruption by *Innell*; and that he would not at any time do any act to impede the operation of that deed, but would at all times allow of, ratify, and confirm all lawful and equitable proceedings to be brought or prosecuted in his or their name or names, with or without his wife, for recovering and obtaining such real and personal estates.” I cannot help observing, that the terms of that agreement are very similar to the language of the 25th section of the Act now under discussion, appearing certainly to refer simply to property which the wife might acquire in her own right and

(a) 4 B. & Ald. 419.

for her own benefit, and not to property she might acquire in an executorial capacity; and so, indeed, it was argued by the counsel who showed cause against setting aside the release; nevertheless, the Court held the release must be set aside, the agreement precluding the husband from executing such a release. Two of the judges did not think it necessary to decide whether he would be able to deal with the property when recovered; but they held the agreement did, in effect, prevent his interfering to stay his wife from recovering that for which she was suing in her capacity of executrix. Chief Justice *Abbott* says:—"Whilst the husband continues to relinquish his marital rights, it would be contrary both to equity and justice, if we were to allow him, in direct violation of the contract which he has made, to execute a release of this sort, and thereby to render the suit commenced by his wife in her character of executrix utterly unavailing. It is not necessary for us to decide as to the right of the husband to receive the money when recovered by the present action. All that we do on the present occasion is to say that he shall not be allowed in this manner to prevent the suit from proceeding." That, of course, could only be by reason of his agreement not to interfere with his wife's recovering the property. Mr. Justice *Bayley* says:—"I am of the same opinion. The wife in this case is bound, as executrix, to act for the general benefit of all persons interested under the will of the testator, and the husband ought not to be permitted to prevent this by a wrongful act, which would amount to a devastavit on his part; he is not to release the debt without sufficient compensation, but ought to suffer the suit to go on to ascertain the amount of the debt. He may, perhaps, be entitled to intercept the money, when it is ascertained upon a trial how much is due; but he ought not to be allowed in this manner to prevent any trial from taking place." Mr. Justice *Holroyd* goes further; he says:

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—"I think that this release ought not to be available to the Defendants, being given under such circumstances and in the progress of the cause. I do not agree in the construction which has been put upon the deed in the course of the argument. It seems to me *to extend to property claimed by the wife in her representative capacity*, and I think that this release is clearly in fraud of the deed of separation." And Mr. Justice *Best's* observations are to the same effect:—"This action is brought on the faith of the stipulation contained in the deed of separation, and I think that the husband ought not, under such circumstances, to be allowed to release the debt, and so altogether to defeat the action."

That decision, besides being an authority as to the construction to be put upon words similar to those in the Act before me, suggests an important reason why a like construction should be given to the language of the Act—at least in a case (and that is all which I have now to determine) where the wife is not only executrix, but also residuary legatee—for, if a contrary construction be adopted, the husband will be at liberty to release the debt in question, and may directly and immediately diminish the personal estate, to which his wife, as residuary legatee, is entitled: say, more, if a wife, being at once executrix and residuary legatee, is not protected by the Act, her husband may sue her and recover the property of the testator, which forms part of her residuary estate, and no act of hers can possibly prevent him from so doing.

I confess I find it difficult to discover any sound distinction for this purpose between a bequest of a term of years, or a specific bequest of stock, where, the bequest being assented to, the thing bequeathed becomes the immediate property of the legatee, from the case before me of a resi-

duary bequest, which is equally the property of the legatee, but subject to a charge for payment of debts.

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What appears to me to make it imperative to adopt the construction for which the Plaintiff contends is this, that, by the effect of the 25th and 26th sections of the Act, the wife can sue and be sued alone in all proceedings, and the husband is not responsible for any engagement, any wrongful act, or any omission on her part; and inasmuch as he is not so responsible and she is made so responsible, it seems to follow, as a necessary inference, that she must have power to sue for and to get in the estate in respect of which she is made responsible, and thus to prevent the loss which would otherwise accrue to those who are interested in the estate.

In the present case, however, I am not called upon to decide that question to its full extent^(a). Here the wife, besides being executrix, has also the beneficial interest, subject only to the payment of debts and legacies; and that being so, I am bound to give her the full benefit intended for her by the Legislature.

Mr. *James*, Q. C., asked that the Bank might pay costs, or, at all events, might bear their own costs. The decision would govern future cases, had been cheaply obtained, and was one of great importance to the Bank. The Plaintiff had nothing but the fund in question.

Mr. *Rolt* contended that the Bank should have their costs. Quoad the property in question, they were trustees.

The VICE-CHANCELLOR.—It is a question of the greatest

(a) Vide *infra*, p. 578, *note*.

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nicety, and one requiring to be settled, for the protection of the public at large. The property in question is Consols, as to which the Bank are public trustees. If it had been Bank Stock, which is their own property, a different question might have arisen. As it is, I cannot possibly say that the Bank ought to pay costs.

*Minute of
 Decree.*

DECLARE, that Plaintiff is entitled to transfer the stock and to receive the dividends in question, without the concurrence of her husband, and as if she were a feme sole. Order transfer and payment accordingly. No order as to costs.

NOTE.—In consequence of the foregoing decision, a clause was introduced into the Divorce and Matrimonial Causes Amendment Act (21 & 22 Vict. c. 108), for the purpose of declaring the Vice-Chancellor's construction of the former Act (20 & 21 Vict. c. 85) to be law. See 21 & 22 Vict. c. 108, s. 7.

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THE ATTORNEY-GENERAL v. MATHIAS.

June 6th, 24th,
25th, & July
8th.

Cor.
V. C. Wood
and Mr. Justice
BYLES.

Rights of the
Crown—Offi-
cers of the
Crown—
Woodwards or
Foresters of the
Crown—Li-
ability to ac-
count—Forest
of Dean—Free
Miners—Mines
and Stone
Quarries—
Gale Fees or
Rents—1 & 2
Vict. c. 43—
Custom—Pre-
scription—Lost
Grant—Profits
à Prendre—

Statutes of Limitation—Manors.

THE Queen, in right of her Crown, is seised to herself, her heirs, and successors, of the soil of the *Forest of Dean*, in the county of *Gloucester*, with its mines and minerals; subject to the rights and privileges vested in the registered free miners of the forest, under an Act passed in the year 1838, for regulating the opening and working of mines and quarries in the forest(a).

By this Act commissioners were appointed for carrying the Act into execution (sect. 1), and it was enacted, that certain persons therein described should be taken to be free miners (sect. 15); that a register of the persons being free miners should be made as therein mentioned (sect. 16); that no person should be deemed a free miner whose name was not registered as such (sect. 21); and that such free

The Defendants claimed, as woodwards or foresters of the Crown, a right to grant to certain free miners gales or licenses for working stone quarries in uninclosed lands, part of the *Forest of Dean*, the soil whereof was in the Crown, to exact gale fees or rents in respect thereof, and to apply the same to their own use without accounting to the Crown:—*Held*, (independently of the considerations that the alleged right, had it existed, would have been extinguished by the *Dean Forest Mines Act*, 1 & 2 Vict. c. 43, and that the evidence failed to establish the exercise of any such right in point of fact), that no such right could exist in point of law: for, with regard, *first*, to the free miners, it was a claim to subvert the soil and carry away the substratum without stint or limit, which could not be established (1) by *custom*, for it was a profit à prendre, which cannot be claimed in alieno solo; nor (2) by *prescription*, for prescription, to be good, must be both reasonable and certain, and this was neither; nor (3) by presuming a *lost grant*, for prescription presupposes a grant, and if such a grant cannot be presumed before, à fortiori it cannot after, the period of legal memory; and a claim which cannot lawfully be made upon one of these three foundations, cannot be substantiated by a user, however long, and is not saved by any Statute of Limitations; and with regard, *secondly*, to the Defendants, besides the foregoing objections, they could not show a valid prescription exempting them, as officers of the Crown, from accounting for the proceeds of the Crown's soil which they had sold.

The office of woodward or forester of the Crown is an office of trust, incapable of assignment without a license from the Crown founded on the return to a writ of ad quod damnum.

Whether such an office can be annexed to a manor—*quere*.


(a) 1 & 2 Vict. c. 43.

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miners, duly registered as such, should have the exclusive right to have gales or leases of quarries within the forest (sect 23). The commissioners were directed, within three years from the passing of the Act, to make an award ascertaining what persons at the passing of the Act were in possession of or entitled to gales of stone quarries within the forest (sect. 24), and to set out by their award the metes and bounds of each gale or quarry, which was thereupon to be held by the person entitled thereto for the term and in manner therein stated, paying to her Majesty, her heirs and successors, such yearly rent as therein mentioned (sect. 27). After the execution of their award, all the customs respecting mines and quarries and the rights and privileges of free miners, other than such as were confirmed by the Act or the award, were to cease (sect. 31). Power was given to the Commissioners of the Woods and Forests to grant leases of quarries in the forest for twenty-one years to any persons being free miners as aforesaid; and it was enacted, that, after the passing of the Act, no quarry within the forest should be opened by any person whomsoever other than under or by virtue of a lease to be granted as aforesaid, notwithstanding any custom or usage to the contrary; and that no person should be entitled to any quarry within the forest except such as under the aforesaid provisions should be specified in the commons award, or except the same should be held under a lease, to be granted in pursuance of the provisions of the Act (sect. 83).

In July, 1841, the commissioners made their award, as required by the Act.

Notwithstanding the Act, and the award, the Defendants *Mathias* claimed to grant, and did in fact affect to grant to persons not named in the award, and not being free miners, and in particular to the Defendant *Morse*, gales or licenses for working stone quarries in uninclosed lands



within a part of the forest called *Blakeney Walk*, exacting in respect thereof certain gale fees or rents, which they applied to their own use without accounting to the Crown.

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Under these circumstances, an information was exhibited on behalf of the Crown, praying (1), that it might be declared that the Defendants *Mathias* had not any right or title to grant gales or leases within any part of the forest to any person or persons whomsoever, or to exact gale fees or rents in respect thereof, and that they might be restrained from making or granting any more such grants or leases; and that the Defendant *Morse* might be restrained from continuing his quarry; and (2), for an account of the quantities of stone worked by or under the authority of the Defendants upon her Majesty's lands within the forest, and of the issues and profits thereof received by the Defendants, and an account of the sums of money, fees, rents, and royalties received by the Defendants *Mathias* in respect of any gales or leases made or granted by them, or any of their predecessors in title, within any part of the forest.

The Defendants *Mathias*, by their answer to the amended information, admitted that the soil of *Blakeney Walk* was in the Crown; but submitted that they had the exclusive right to grant gales or licenses for working stone quarries therein, if not to all persons whomsoever they might choose to select for that purpose, at all events to free miners of the forest.

They claimed this right as successors in title to one *William Ambrose*, in whose favour the Act of Parliament contained, in the 85th section, the following saving clause:—"Whereas a claim was made by *William Ambrose*, Esquire, as lord of the manor of *Blakeney*, before the said commissioners of inquiry," (meaning the commission-

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ers of inquiry into matters relating to the *Forest of Dean*, appointed in 1832), "to grant gales for quarries and exact gale fees and rents within the bailiwick of *Blakeney*, in the said forest, founded upon some grant, or alleged grant, made by her Majesty's royal predecessor King *Edward the Third*, which claim is not admitted, but altogether denied on behalf of her Majesty; and legal proceedings have been instituted by the *Attorney-General* on behalf of her Majesty, and are now depending, for the trial of such claim; be it therefore enacted, that nothing in this Act contained shall prejudice the just and legal rights of the said *William Ambrose*, or the just and legal rights of her Majesty, her heirs and successors, in relation to such claims, or any proceedings already taken, or which may be hereafter taken, by or on behalf of her Majesty, her heirs and successors, or the said *William Ambrose*, his heirs, executors, administrators, and assigns, in relation to such claim so preferred by or on his behalf as aforesaid."

They alleged that the office of woodward or forester of the Crown had been annexed, from time immemorial, to the manor of *Blakeney*, and had been held as such by *William Ambrose* and his predecessors in title, lords of that manor; and that throughout the period of legal memory he and his predecessors in title had exercised the right now claimed of granting gales as a perquisite of their office as woodwards or foresters of the Crown.

The manor of *Blakeney* is a small manor, lying without the limits of the present *Forest of Dean*.

Evidence was adduced by the Defendants with a view to show that the right they claimed had been exercised by their predecessors in title, as alleged in their answer; but the Court was of opinion that there was no evidence of

such user before the time of King *Charles* the First, and that all the acts on which the Defendants relied as evidence of such user were simply acts of usurpation.

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On the other hand, four grants by King *Edward* the Third of the office of bailiff, or woodward of the forest, were produced on the part of the Crown.

Mr. *James*, Q.C., and Mr. *Hanson*, for the Crown, contended, first, that the right claimed, being a right to subvert the soil, and to carry away the substratum without stint or limit, was one which could not, in point of law, exist in any person other than the Crown, the owner of the soil; much less could such a right exist in the Defendants claiming as foresters or officers in trust for the Crown. Secondly, that, even if such a right could exist in point of law, the evidence failed to show that it ever had existed, in point of fact, in any of the persons through whom the Defendants claimed; and, thirdly, that if both the previous objections were surmounted, and the right in question had existed down to the passing of the Act 1 & 2 Vict. c. 43, it was extinguished by the Act, unless the Defendants could bring themselves within the saving clause in favour of *Ambrose(a)*; which they could not.

Argument.

The Crown, therefore, was entitled to a declaration and to an injunction as prayed, as also to an account; but with regard to the account of what had been received for gales or leases, they would ask it only in respect of gales or leases granted by the Defendants, without adding "or any of their predecessors in title."

Mr. *Willcock*, Q.C., and Mr. *W. Morris*, for the Defendants—

(a) 1 & 2 Vict. c. 43, s. 85.

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Did not claim to grant gales to any stranger, but only to free miners; which right, they contended, was saved by the 85th section of the Act(a). They cited *Manwood's* Forest Laws, to show that the office of woodward could be annexed to a manor; and contended that the evidence proved that in this case it had been so annexed. *Rogers v. Brenton*(b) showed that the custom of tin-bounding in *Cornwall*, which is a profit à prendre, can exist in alieno solo; and here it was in evidence, that the rights claimed by the Defendants had been exercised throughout the period of legal memory, or, at all events, for more than a century, so as to entitle the Defendants to the benefit of the Nullum Tempus Act(c), and the Statutes of Limitation.

Mr. James, Q. C., replied.

[In addition to the authorities referred to in the opinion of Mr. Justice Byles, the following cases were cited:—*Heddy v. Wheelhouse* (d), *Lord Pelham v. Pickersgill* (e), *Selby v. Robinson* (f), *Grimstead v. Marlowe* (g), *Roe dem. Johnson v. Ireland* (h), *Goodtitle dem. Parker v. Baldwin* (i), *Mayor of Kingston-upon-Hull v. Horner* (k), *Bright v. Walker* (l), *Attorney-General v. Lord Hotham* (m), *Gibson v. Clark* (n), *Attorney-General v. The Corporation of London* (o), *Mill v. The Commissioners of the New Forest* (p).]

Judgment reserved.

(a) Suprà, p. 581.
 (b) 10 Q. B. 26.
 (c) 9 Geo. 3, c. 16.
 (d) Cro. Eliz. 558, 591.
 (e) 1 T. R. 667.
 (f) 2 Id. 758.
 (g) 4 Id. 717.
 (h) 11 East, 280.

(i) Id. 488.
 (k) Cowp. 102.
 (l) 1 Cr. M. & R. 211.
 (m) T. & R. 209.
 (n) 1 Jac. & W. 159.
 (o) 2 Mac. & G. 247.
 (p) 18 C. B. 60.

Mr. Justice BYLES now read the following opinion :—

The Defendants, Messrs. *Mathias*, claim a right to grant gales or licenses for working stone quarries in uninclosed lands within a part of the royal *Forest of Dean*, called *Blakeney Walk*, to exact payments in the shape of gale fees or rents in respect thereof, and to apply those payments to their own use without accounting to the Crown.

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They allege that they enjoy this right as woodwards or foresters of the Crown in *Blakeney Walk*; that the office of woodward or forester was annexed to a small manor called *Blakeney Manor*, which is without the limits of the present *Forest of Dean*; and that the office, with its perquisites, has devolved upon them as owners of that manor.

This is, in effect, an alleged right of an officer of the Crown to sell the soil of the Crown, and not to account for the proceeds. It is plain, to say the least, that serious doubts may exist as to the legality of any such right, and that, if it can legally exist, it ought to be established by evidence cogent and invincible.

But, on the threshold of the case, before arriving at the two inquiries—first, whether, in point of law, the alleged right can exist; and, secondly, whether, if so, it ever did in fact exist—the Informant presents the preliminary difficulty that the Defendants' rights, if ever they had any, are extinguished by the Statute 1 & 2 Vict. c. 43.

Into the detailed provisions of that statute it is not necessary to enter; for it is admitted, that, unless the Defendants can bring themselves within the words of a saving clause (section 85) introduced for the benefit of their predecessor in title, one *William Ambrose*, the statute and the award made under it extinguish all previous rights of

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quarrying, however good in law and however clearly established in fact, thus making a *tabula rasa*, on which to inscribe the new rights created by the statute.

That saving clause does not purport to save all the rights of *William Ambrose*, whatever they may have been, but only his right as he stated and claimed it before the commissioners of inquiry. His claim, as appears from the same section (85), was this:—A claim by him as lord of the manor of *Blakeney*, founded on a grant of King *Edward the Third*, to grant gales for quarries and exact gale fees and rents within the bailiwick of *Blakeney*.

The first observation upon the saving clause is, that even if the claim be perfectly legal and well established, it is not clear that the saving clause would prevent the indirect operation on the Defendants' rights of the extinctive clauses of the statute. For, from the Defendants' answers, and from the statements of their counsel, it appears that the Defendants do not claim a right to grant a gale or license to any stranger, but only to persons called free miners, who, though not claiming in respect of any land owned or occupied by them, but only in respect of their birth, residence, or occupation within the district, yet claimed a right to have these gales granted to them. The rents and profits of the Defendants appear, therefore, on their own statement, to be entirely dependent on the rights of the old free miners. But, by the statute, a new body of free miners is substituted for the old body, and the old body of free miners is extinguished. The new free miners are to be registered; and by section 21, no person is to be deemed a free miner whose name is not upon the register. To the new registered free miners alone are gales or leases of quarries for the future to be granted (section 23). Now, as to the Defendant *Morse*, to whom the other Defendants are accused by the information of galing a quarry, he is

not one of the new registered free miners, and the rights of all the old free miners to gales are abolished absolutely. How, then, can the Defendants, Messrs. *Mathias*, support a claim to grant gales to persons not only whose title to demand a gale, but whose capacity to accept a gale, is abolished? No saving clause reaches the case of the old free miners. And the saving clause introduced in favour of the Defendants seems to reach their case only in the event of a contingency made impossible—that is to say, of an old free miner still entitled and still qualified to take a gale accepting a gale from them. To hold that the old free miners still exist for the benefit of the Defendants, would be to nullify the main provisions of the Act of Parliament. A clause giving compensation would heal the injury, if any were really inflicted; but there seems to me great force in the informant's objection, that the saving clause does not.

Suppose, however, that the saving clause could be stretched to meet the case, still it only meets it if the claim contained in the saving clause be made out in its terms. To make out that claim, the Defendants must establish each of these three propositions:—*First*, That they are the woodwards or foresters of *Blakeney Walk*, for they claim the rights in question as perquisites of that office; *Second*, That the woodwardship is annexed to the lordship of the manor of *Blakeney*; *Third*, That it was annexed to the lordship of the manor of *Blakeney* by a grant of King *Edward* the Third. Each of these positions requires to be briefly examined.

First, are the Defendants woodwards or foresters of *Blakeney Walk*? They cannot pretend to be so otherwise than as lords of the manor of *Blakeney*. A prescriptive title to the office in gross is negatived by the grants of King *Edward* the Third, and there is no evidence, direct or presumptive, of any grant of the office in fee to any individual

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in gross, still less to any ancestor of theirs, and no evidence of the exercise of the office by their ancestors as grantees of the office in gross. As to taking it by assignment from a grantee in gross of the Crown, the office is, according to the authorities, an office of trust, incapable of assignment without a license from the Crown, founded on the return to a writ of *ad quod damnum*(a). The Defendants are, therefore, obliged to claim, and do accordingly claim, the office of woodward or forester as annexed to the manor of *Blakeney*.

Secondly, was the woodwardship ever annexed to the manor of *Blakeney*?

In the first place, it should seem from the passage cited from Lord *Coke*, that, in point of law, the office cannot be so annexed; for, if it can, it becomes assignable, and, though it be an office of trust, may pass to the assignees of a bankrupt, which is a startling proposition. An authority has, indeed, been cited from *Manwood*, to the effect that it may be annexed to a manor; but, in the conflict of authorities, one is disposed on principle to think that it cannot be so annexed, and the absence of examples or precedents of such an annexation fortifies the conclusion.

But, suppose it can be annexed, was it, in fact, ever so annexed? Certainly not by any evidence of express existing grant. Certainly not by prescription, for grants of this very woodwardship by the Crown to individuals at pleasure and for life have been produced since the time of legal memory. Is a lost grant since the time of legal memory to a lord of the manor, as such, in fee to be presumed? Is there any reasonable evidence of the continuous exercise of an hereditary office by individuals in their capacity of lords of the manor in fee, and necessarily and only in that capacity,—an exercise of the office so restrained to the lords of the manor

(a) 4 Co. Inst. 315, 316.

as to be inexplicable on any other hypothesis than that they held the forestal office in fee as lords of the manor? It is not easy to see any such. If there be none, then there is no evidence of lost grant. But there is evidence on the other side, for the four actual grants which have been produced make it more reasonable, that if any exercise of the office is proved and is referable to any presumed grant, it should be referred to a grant of such a description as the grants which are proved to have actually existed, viz. grants during pleasure or for life. The only three foundations of such a right, therefore—viz. existing grant, prescription, lost or presumed grant—seem equally to fail.

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But, assuming that the woodwardship could be and really was annexed to the manor by royal grant; then arises the other inquiry, *thirdly*, was it annexed by a grant of King *Edward* the Third? To arrive at this conclusion, one or other of these gratuitous presumptions must be made—either that the last grantee for life of King *Edward* the Third, whose grant is dated 1349, pre-deceased that king, and that the king, after the death of the grantee for life, and before the date of his own death in 1376, granted to a lord of the manor in fee as he had never done before; or else that King *Edward* the Third, between the year 1349, the date of the last grant for life, and his own death in the year 1376, granted the reversion in fee in the office to the lord of the manor. It is surely not too much to say, there is no evidence whatever in support of either of these hypotheses. They are purely gratuitous. Indeed, there is no more reason in fact or in law, but less reason, to presume a grant by King *Edward* the Third than by any of his successors.

For these reasons it appears to me, assuming the Defendants' claim to be of a nature capable of being supported in point of law, that they have failed to make out any one of those three requisites, every one of which they must establish

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to bring themselves within the saving clause of the statute; and, if that be so, then the extinctive clauses of the statute wipe out and expunge all their rights, whatever they may have been.

But it may be more satisfactory to the Defendants if we proceed to inquire whether they really had, or rather, in point of law, could have had, before the statute, any such legal right as they claim, though not falling precisely within the very words of the saving clause. Could they, under any circumstances, make out by this or any other presumptive evidence a right to take by the hands of the free miners the soil of the Crown without accounting for the proceeds?

The whole burden of proof is on the Defendants, for the soil of the forest is in the Crown. The statute recites that fact; and if it be contended that the saving clause protects the Defendants from being injuriously affected by that recital, the informant's evidence proves the soil to be in the Crown, and the answer of the Defendants themselves admits it.

It seems to me, first, that the free miners themselves could, in point of law, have had no such right as the Defendants' claim assumes them to have had.

The claim of the free miners is to subvert the soil and carry away the substratum of stone without stint or limit of any kind. This alleged right, if it ever existed, must have reposed on one of three foundations—custom, prescription, or lost grant.

The right of the free miners is incapable of being established by custom, however ancient, uniform, and clear the exercise of that custom may be. The alleged custom is a custom to enter the soil of another and carry away portions of it. The benefit to be enjoyed is not a mere easement, it

is a profit à prendre. Now, it is an elementary rule of law that a profit à prendre in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right. The leading case on the subject is *Gateward's case*(a), which has been repeatedly followed and never overruled. Thus, in *Blewett v. Tregonning*(b), it was held, that the right to take even the adventitious soil or sand that had been blown from the shore on to land contiguous to the sea could not be claimed by custom, though it was urged that to follow this drifted sand was only following a chattel. It is true that the Court of Queen's Bench, in *Rogers v. Brenton*(c), expressed an extra-judicial opinion that the custom of tin-bounding in *Cornwall*, which involves the taking of a profit in alieno solo, might have been good, if coupled with an obligation to work. But, assuming that opinion to be correct, I am not aware that it has ever been extended to any other case; and so difficult did the learned counsel for the Plaintiff in *Rogers v. Brenton* feel their position to be, that they desired to treat the custom which they were bound to support as the *lex loci* of a province. Notwithstanding all that was said in *Rogers v. Brenton*, yet *Gateward's case* still stands forth as the land-mark of the law on this subject. And no actual decision has been cited at the bar to show that a right of this nature ever has been claimed by custom only, and supported.

The next question is, can such a right as this be claimed even by prescription? I will assume, against the fact, that there is no evidence to negative prescription. The present is a claim, not only to carry away the soil of another, but to carry it away without stint or limit; it is a claim which tends to the destruction of the inheritance, and which ex-

(a) 6 Rep. 59.

(b) 3 Ad. & Ell. 554.

(c) 10 Q. B. 26.

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cludes the owner. A prescription, to be good, must be both reasonable and certain^(a), and this alleged prescription seems to be neither. Thus, a claim of a common without stint annexed to a messuage without land is bad: *Benson v. Chester* ^(b). Lord *Coke* says ^(c), that you must not exclude the owner of the soil. And in *Clayton v. Corby* ^(d), although a jury had found a thirty years exercise without interruption, as of right, of a claim by prescription to dig clay in the Plaintiff's land for the Defendant's brick kiln, and though the verdict could not be assailed, yet the Court of Queen's Bench gave judgment for the Plaintiff non obstante veredicto, on the ground that such a prescription was radically vicious, and incapable of being sustained, for that it was an indefinite claim to take all the clay, in other words to take the whole close. That case rests on the soundest rules of law, and is an authority expressly in point, showing that the strongest evidence of user could not support this as a prescriptive claim.

The only remaining question on this part of the case is this: Can the claim be sustained by evidence of a lost grant? Prescription presupposes a grant, and if you cannot presume a grant of an unreasonable claim before legal memory, à fortiori can you not presume one since.

The Defendants have relied on the Statutes of Limitation; but as to Statutes of Limitation, a claim which is vicious and bad in itself cannot be substantiated by a user, however long. Upon Statutes of Limitation the case of *Clayton v. Corby* ^(d), is again decisive. The Statute 2 & 3 Will 4, c. 71, s. 1, enacts that no claim which may be lawfully made at common law by custom, prescription, or grant, shall be defeated after the periods there mentioned; yet

(a) Com. Dig. "Prescription."

(b) 8 T. R. 396

(c) Co. Litt. 122.

(d) 5 Q. B. 415.

the case of *Clayton v. Corby* shows, that, if the claim was not one which could be lawfully made by custom, prescription, or presumed grant, it will, however clearly proved, nevertheless be defeated.

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These legal objections apply to the claim of the free miners; but they apply equally to the Defendants, who claim to enjoy the benefit of taking away the soil by the hands of the free miners; and the Defendants are, on their own showing, in a worse situation than the free miners, for the Defendants have to show a valid prescription exempting them as officers of the Crown from accounting for the proceeds of the Crown's soil, which they have sold. If a forester cannot prescribe to have windfalls, as, according to Lord *Coke*, he cannot (*a*), because they were portion of the King's inheritance, then, by the stronger reason, can he not prescribe to sell the very soil on which the trees grow, and to appropriate the proceeds.

If these observations on the law of the case are well-founded, it is unnecessary to add any further remarks on the evidence; for I regret that I feel it my duty to express to his Honour the Vice-Chancellor my humble opinion that the claim is one which cannot be supported in point of law.

VICE-CHANCELLOR SIR W. PAGE WOOD (after thanking the learned Judge for his advice with reference to the points of law of the case) proceeded to examine at length the evidence adduced by the Defendants to establish that the right they claimed had been exercised by their predecessors in title, as alleged in their answer; and concluded as follows:—

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Having gone through the case to that extent, it appears

(*a*) 4 Inst. 299.

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to me that the whole character of the demands made by the Defendants and their predecessors in title has been, from first to last, of that uncertain and shifting description which indicates simple usurpation. So that even if there were not grave objections in point of law to the propositions they have asserted, the case of the Defendants would, upon the evidence alone, be entirely hopeless.

At the same time, I concur most entirely with the advice which has been given me upon the points of law, namely, that the right claimed by the Defendants to grant gales or licenses to any persons whatever for working the quarries in question is one which cannot be upheld, and that the right of the free miners to have such grants made to them is one which cannot exist in law; and in that view it appears to me that the Defendants would have been in as hopeless a position before the passing of the Act^(a) as they are in now that the Act has passed. So that the saving clause^(b), even if they could bring themselves within it, which I concur with the learned Judge in thinking it impossible for them to do, would not have saved those rights which the Defendants allege to have existed in their predecessors in title, but which are now proved to demonstration to have never so existed.

The Crown, therefore, is entitled to a declaration and injunction as prayed, and also to the account asked at the bar.

Decree accordingly.

(a) 1 & 2 Vict. c. 43.

(b) *Id.* s. 85.

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IN the year 1780, *George Arnold*, being seised in fee of twelve 24th parts of the manor of *Kilsby*, which was held by several persons as tenants in common, purchased lands copyhold of the manor, which were thereupon surrendered to the use of one *Winterton*, who, by a declaration of trust, declared himself to be a trustee thereof for *George Arnold*. *Winterton* afterwards surrendered the premises to the use of *Arnold*, and *Arnold* was then admitted tenant of the entirety thereof by the act of all the lords.

Arnold died without having surrendered the premises to the uses of his will.

The Chief Clerk certified that twelve 24th parts of the manor passed by the will of *Arnold* to the Defendant *Coape*.

The Plaintiffs, and the Defendants other than *Coape*, were entitled to *Arnold's* copyhold hereditaments.

It was contended in Chambers on behalf of the Defendant *Coape*, that, upon the surrender to the use of *Arnold*, the twelve 24th parts of the copyhold interest in the premises merged in his freehold estate therein as lord of the manor.

This being denied by the other parties, the question was reserved, and now came on to be argued in Court on the hearing of the cause on further consideration.

July 2nd, 6th,
§ 15th.

Copyhold—
Merger—
Extinguishment
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Manors.

A., seised in fee of twelve 24th parts of a manor held by several as tenants in common, purchased lands holden of the manor, which were thereupon surrendered to a trustee for him, and afterwards to himself in fee, and he was admitted tenant of the entirety by the act of all the lords:—*Held*, that twelve 24th parts of his copyhold interest in the lands merged in his freehold estate therein as lord of the manor.

The law as to the divisibility of manors, and the consequences of a division, considered.

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Mr. *John Pearson*, in the absence of Mr. *Rolt*, Q. C., for the Plaintiff,

Contended, that the twelve 24th parts of *Arnold's* copyhold interest had not merged, but still continued to be copyhold.

Among other inconveniences attendant upon a partial extinguishment, all such of the services to be rendered by the tenant as are entire would be gone. If a tenant severs or parcels the tenancy to others, the lord, being a stranger to the act, is benefited; but if the lord himself take any parcel of the tenancy, that shall turn to his prejudice, for, by his acceptance of any part of the tenancy, all yearly entire services are extinct and gone, as if he had released his seignory: *Bruerton's case*(a), affirmed in *Talbot's case*(b) to be good law by the whole Court. If, therefore, the Court should hold that the surrender to the use of *Arnold* operated as a partial extinguishment, the result would be an injury to the other lords of the manor. It is true, a tenant for life of a manor, by taking a surrender to himself and his heirs, merges the copyhold in the manor; but that is upon the principle that a tenant for life may do what is for the benefit of the parties having the ulterior interest. It does not follow that he may do what would work injury and injustice by them.

The only case of partial extinguishment to be found in the books is one where the interest of the lords was a joint tenancy; but that depended upon the law that joint tenants are seised per mie et per tout(c). Here the tenancy was in common.

Then, as regards the admittance, either it was good,

(a) Rep. Part vi., 1 b.

(b) Id. Part viii., 105.

(c) 1 Watkins' Copyholds, Ed. 4, p. 427.

in which case *Arnold* and those claiming under him continued to be tenants of the manor; or it was bad, and the copyhold interest continued such.

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Mr. *Rogers* for the Defendants other than *Coape*, supported the Plaintiff's contention.

[They cited also *Simpson's case*(a), *Bambridge v. Whitton*(b), *Bingham v. Woodgate*(c).]

Mr. *Toller*, Q. C., and Mr. *Chapman Barber*, for the Defendant *Coape*, contended, that, as to twelve 24ths of the lands purchased by *Arnold*, there had been an extinguishment, or at least a suspension of the copyhold tenure, *Arnold* being lord of twelve 24ths of the manor of which they were holden; upon the broad principle "nemo potest esse dominus et tenens."

It is admitted that there can be a partial extinguishment where the lords are joint tenants; and for this purpose there is no distinction in principle between a joint tenancy and a tenancy in common. As regards the latter, there is no decided case expressly in point; but in "Cases and Opinions" there is the opinion of Mr. *Booth* and Mr. *Filmer* upon facts precisely similar to the present(d).

(a) Godb. ca. 364.

(b) March, 177.

(c) 1 R. & M. 32; and Gilbert's *Lex Prætoria*, 52.

(d) Ca. and Op. "Copyholds," ca. 7, (Vol. i., p. 166). It is briefly this:—A., being seised in fee of one moiety of a manor, and B. and C. being seised in fee of the other moiety, copyholds of the manor were surrendered into the hands of the lords to the use of A. and his heirs. This operating, as it

was supposed, as an extinguishment as to one moiety of the copyhold premises, A. came into court and prayed to be admitted to a moiety; to whom B. and C. (lords of a full moiety), by their steward, granted seisin of one full moiety of the premises, to hold to A., his heirs and assigns; and he was admitted and surrendered the premises to the uses of his will. He then devised all his manors, lands, &c., to E. for life, remain-

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That opinion, if correct, is conclusive in favour of the Defendant *Coape*.

[They cited also *Coke's* "Complete Copyholder," 173; and *Attree v. Scott(a)*.]

Mr. *Pearson* in reply :—

The custom of the manor in question in the case before Mr. *Booth* must have been peculiar, the manor being vested as to one moiety in A., as to the other in B. and C., who affect to act independently of A. as owners of a separate lordship; or else the whole case must have proceeded upon the supposition that a lordship is divisible, which has since been settled not to be law.

Then as to the objection, *nemo potest esse dominus et tenens*, the contention that there has been a partial merger is equally open to that objection.

[Upon the question whether a manor was divisible, Mr. *Lee*, Q. C., as *amicus curiæ*, referred to *Hanbury v. Hussey(b)*.]

Judgment reserved.

July 15th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It is singular that the precise point now in question does
 der to F. in tail, remainder to G. in tail. E. entered, was admitted to a moiety of the copyhold, and died. F. died without issue. G. entered and suffered a recovery of his moiety of the manor, and then by lease and release conveyed the same to H. in fee. H. entered not on any part of the copyhold lands, but G. was in possession and contracted with J. S. to sell the same to him. The joint opinion of Mr. *Booth* and Mr. *Filmer* was, that for one moiety of the copyhold lands the copyhold tenure was suspended.
 (a) 6 East, 476; but see *Gurland v. Jekyll*, 2 Bing. 273.
 (b) 14 Beav. 152.

not appear to have arisen for determination in any reported case, the point being simply this, namely, whether, if there be several lords of a manor as tenants in common, and one of them, having a moiety of the manor, purchase lands holden of the manor, which are thereupon surrendered to a trustee for him, and afterwards to himself, and he is then admitted tenant with the concurrence of all the other lords of the manor, his copyhold interest in the lands is, as to a moiety thereof, extinguished or merged in the freehold ; or whether that moiety still continues copyhold in his hands :— in other words, whether as to a moiety of the purchased lands there can be in one and the same person the interests of lord and tenant.

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The question was ingeniously argued on the part of the Plaintiff ; but there seems to be a broad principle of law which must decide it, unless there be some conclusive reason to the contrary,—that principle being, that a man cannot be both lord and tenant of the same lands, but if he purchase and be admitted to lands holden of the manor of which he is lord, the copyhold interest is immediately extinguished in the seignory.

Bruerton's case (a) was cited, to show that there is a distinction between cases where the severance of the tenancy is the act of the tenant, and those where it is the act of the lord himself ; that the former, being an act to which the lord is a stranger, gives a benefit to the lord ; whereas, if the lord himself take any part of the tenancy, it turns to his prejudice, all the yearly entire services becoming, by his own act, extinct and gone. Even if that case were applicable to the present, I do not see how it could be used as an argument to disprove that the copyhold interest was extinguished, for here all the other lords joined to admit the one

(a) Rep. Part vi., 1 b.

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who accepted the tenancy; the loss to them, therefore, if loss there were, by reason of the extinguishment, was occasioned by their own act, and "volenti non fit injuria."

It was argued, that there cannot be a partial extinguishment where the lords are tenants in common; that the only case of partial extinguishment to be found in the books is one where the lords were joint tenants; which it was contended was on the principle that joint tenants are seised per mie et per tout, whereas tenants in common are not so seised. In answer to this there was cited from the valuable publication intituled "Cases and Opinions," the opinion of two of the most eminent conveyancers who ever practised in that branch of the profession, Mr. Booth and Mr. Filmer, to the effect that a moiety of a manor would be merged in a case where the lords were tenants in common, and that too under circumstances less strong than the present, by the mere fact of a surrender to the use of one who was tenant in common of the manor.



To that opinion it was objected, on the part of the Plaintiff, that the very statement of the case on which it was taken threw a doubt upon the whole opinion; that, according to the statement of the case, A., who was lord of a moiety of a manor, having purchased lands copyhold of the manor, was admitted by B. and C., lords of the other moiety of the manor, to a moiety of the lands;—which, it was argued, could only be upon the supposition that the lordship was divisible, whereas the law, it was said, is now well settled that in all ordinary manors the lordship is indivisible.

This objection led me to ask a question, which was also of importance in the general view of the case, namely, whether there had ever been a case of partition of a manor?

Mr. Lee, as *amicus curiæ*, referred me to the case of *Hanbury v. Hussey*(a), where, upon the authority of two early cases, *Sparrow v. Fiend*(b) and *Lay v. Cox*(c), partition of a manor was decreed. At the end of the report of *Hanbury v. Hussey* I found a reference by Mr. Beavan, the reporter, to *Viner's* "Abridgment," to the effect that if coparceners of a manor make partition, every one shall have a several manor and court baron(d); which shows that the facts, as stated in the case on which Mr. Booth's opinion was taken, may well have occurred.

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In the passage cited from *Viner's* "Abridgment," reference is made to the case of the county palatine of *Wexford*(e), reported in the valuable collection made by Sir John Davies, of cases adjudged in *Ireland*. The county palatine of *Leinster* was granted in the time of Henry 2 to Earl *Strongbow*. The seignory afterwards descended upon five daughters of William, the Marshal of *England*, by the daughter and heir of *Strongbow*; and upon partition made between these five daughters, each had an entire county allotted to her, the county of *Wexford* being allotted to one. And it was held, or argued (for in the earlier reports it is not easy to distinguish the arguments of counsel from the decision of the Court), that thereupon each had a several county palatine, and all the liberties and prerogatives in her several purparty, as *Strongbow* and the Marshal had in the entire seignory of *Leinster*; and then comes this passage:—"As if three parceners be of a manor who made partition, each of them shall have a manor and court baron within her purparty."

For this last position, which shows what was then considered to be the law upon the question under discussion,

(a) 14 Beav. 152.
(b) 1 Dick. 348; see also *S. C.*,
as stated, 14 Beav. 156.

(c) 1 Dick. 348, note.
(d) 16 Vin. 224, Ed. 2.
(e) Davies, Ed. 1762, p. 167.

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the authority cited is a case from the Year-book of the 26th of *Henry 8* (a), which is as follows :—"Nota q̄ fuit agre q̄ si un mañ descend a deux p̄ceners ou plusieurs, et ils font p̄tiç, issint q̄ chescun d'eux ad pcel' demaine et pcel' d's services, chescun d'eux ad un mañ," agreeing in substance with the passage in *Sir John Davies' Report*, that upon partition of a manor by three coparceners each has a separate manor.

That being so, there can no longer be any question as to the general principle of law, that a person who is lord of a moiety of the manor might have his separate court, and the lords of the other moiety might have their separate courts. And if so, the facts of the case stated for the opinion of *Mr. Booth* are not open to suspicion.

Here, besides having the advantage of the opinion of *Mr. Booth* and *Mr. Filmer*, as to what would have been the result if there had been merely a surrender of the lands to the use of *Arnold*, I have the additional circumstance that he was admitted, and that his admittance was the act of all the other lords, who, choosing by their own act to submit to a merger of the services, cannot complain if they have sustained loss in consequence of their so doing.

I must, therefore, hold that the twelve 24ths passed with the freehold hereditaments.

(a) 26 H. 8, Ca. 15.

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AND

HALL v. WARREN.

June 4th.
& July 16th.

WILLIAM HALL, by his will, in 1853, after giving all his real and personal estate to his executors, devised thus:—"I will that my freehold house, No. 71, *Queen's-road, Bayswater*, be given to the inhabitants of *Bayswater*, to found a lying-in asylum for unmarried women, or poor married women, if there is more than three beds to spare. . . . I will that the same be called *Hall's Maternal Asylum for Unmarried Women*; I will that my said executors do call a meeting of the neighbours and inhabitants of one mile round the said house, as soon as convenient, to appoint a committee and trustees to carry out the same. I do appoint my godson, *William Hall Warren*, one of the said trustees, leaving to the inhabitants to make choice of as many more as they may please. But in the event of the said inhabitants not appointing a committee, or not [being] willing to carry out the same scheme, I then will that all my said property so given to said maternal retreat or lying-in asylum shall absolutely belong to my said godson *William Hall Warren*.

The will contained several other devises and bequests of freehold and leasehold property in favour of the same maternal asylum.

After the testator's death suits were instituted, one by

ciple of *Jones v. Westcomb* (Prec. Ch. 316) and *Avelyn v. Ward* (1 Ves. sen. 420), that the devise over was valid, notwithstanding the circumstance that the prior devise failed to take effect by reason of the Statute of Mortmain, and not in the manner contemplated by the testator.

Observations on *The Attorney-General v. Hodgson* (15 Sim. 146) and *Philpott v. The St. George's Hospital* (21 Beav. 134).

In such a case it is not competent to the trustees to determine whether the property shall go to the heir-at-law, or to the devisee, simply by performing, or abstaining from performing, a condition in the performance of which they can have no interest.

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R R

Will—Construction—Mortmain—9 Geo. 2, c. 36—Devise void under—Limitation over—Trustees.

Devise of a house to the inhabitants of B. to found a lying-in asylum, the executors to call a meeting of the inhabitants within a mile round the house to appoint a committee and trustees to carry out the same; testator's godson to be one of the said trustees. "But in the event of the said inhabitants not appointing a committee, or not [being] willing to carry out the same scheme," then a devise over to testator's godson:—*Held*, upon the prin-

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William Hall Warren for the usual administration decree, the other by *Henry Edward Hall*, the heir at law and one of the next of kin, to have it declared that the several devises and bequests for founding the asylum were illegal and void, and that the testator died intestate as to the real and personal estate therein comprised.

It appeared that by the decree in the first suit an inquiry had been directed whether a meeting had been called by the executors, and trustees appointed, as directed in the will, when it was found that this had not been done.

Both causes now coming on to be heard together upon the construction of the will, two questions were raised, one as to the validity of the gift over of the house, No. 71, *Queen's-road, Bayswater*, in favour of the testator's godson, *William Hall Warren*; the other, whether, having regard to the peculiar terms of the will, which was extremely informal and written by a very illiterate person, property subsequently mentioned was subject to the condition annexed to that bequest.

Argument.

Mr. Rolt, Q. C., and Mr. De Gex, appeared for *William Hall Warren*.

Mr. Osborne for *Henry Edward Hall*, the heir at law, and one of the next of kin of the testator.

Mr. Bevir for others of such next of kin.

Mr. Wickens for the *Attorney-General*.

Mr. De Gex in reply.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

In this case the question arises upon the will of an illiterate person named *William Hall*, and it is a question perhaps of as considerable difficulty, both as to the construction of the will and the application of the rule of law to the will when interpreted, as any I ever met with.

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The will itself ought first to be construed.

[The VICE-CHANCELLOR then proceeded to discuss the question of construction. This part of the judgment turning upon the special language of a will most irregularly and ignorantly framed, it has not been thought proper to report it beyond the conclusion arrived at by the Court, which was as follows :—]

Upon the whole, therefore, it appears to me, that, according to the true construction of the will, the condition annexed to the gift of the house, No. 71, *Queen's-road, Bayswater*, that the inhabitants should appoint a committee and trustees to carry out the testator's scheme for an asylum, was not intended by the testator to attach merely to that house, but to all the other freehold and leasehold property by the will devised and bequeathed in favour of the asylum ; and intending that condition to attach to all the property, he has in his will expressed what he intended to be the result in the event of the nonfulfilment of that condition, viz. that all the property should absolutely belong to his godson.

Having arrived at that conclusion as to the construction to be put upon the words of the will, the next question, and one of great difficulty, is, what is to be done with a devise over, following, as this does, a devise which, as the *Attorney-General* has at once conceded, is clearly void ab initio by the Statute of Mortmain.

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One argument urged on behalf of the godson was, that the testator, having directed his executors to call a meeting of the inhabitants to appoint a committee and trustees, inasmuch as the decree directed an inquiry whether that meeting had been called and trustees appointed, and it has been found that this has not been done, it follows, that, according to the strict letter of the trust, the godson is entitled.

I do not think that argument sound. As regards the decree, if the inquiry was superfluous, that informality is one which, according to the present practice of the Court, could easily be remedied ; and as regards the strict letter of the will, the trust for the charity being void, it is utterly immaterial to the inhabitants whether the condition—the holding of the meeting and appointing of trustees—be performed or not ; and that being so, I apprehend it would be impossible to hold that the inhabitants have the power of giving the property to the heir at law or to the devisee, simply by performing or abstaining from performing a condition, in the performance of which they can have no possible interest. Such a decision would be inconsistent with the principles upon which this Court has held that the acts of third parties, under such circumstances, cannot determine the rights of adverse claimants.

That observation, however, has some weight with reference to what should be the construction of a limitation expressed in this form of condition, when the devise itself to which the condition is attached is void. For the reason why it has been held that the acts of third persons shall not determine the rights of adverse claimants, is, that they have no interest in the matter ; and it was only in respect of the interest they were intended to have that it was left in their hands to perform the condition or not as they should see fit. Had it been a merely arbitrary condition,—had

the testator left it to perfect strangers to say whether the property should go to the devisee or to the heir at law, then, according to the arbitrary law the testator himself had imposed, the act of those strangers would have been a condition necessary to be fulfilled before either party could claim the property. But here it is not a merely arbitrary condition, not an act to be performed by persons intended to have no interest in the matter. The inhabitants were intended to have, and had not the Statute of Mortmain interfered they would have had, a direct interest in the condition to be performed; and in respect of such interest it was that the performance of the condition was left in their hands.

Now in every other case, except one like the present, where the devise in respect to which the condition is annexed is rendered void by the Statute of Mortmain, there is abundant authority to show that the efficacy of the ulterior devise is not to depend upon the performance or nonperformance of the condition; but if, by any means whatever, the devise to which the condition is attached is out of the way, the ulterior limitation shall take effect.

Suppose, then, that in this case the first devise, instead of being a devise void ab initio by the Statute of Mortmain, had been a bequest of personalty to the committee of some lying-in hospital actually existing at the date of the will, with certain conditions attached, which might or might not be consistent with the rules of the establishment, followed by a direction that in the event of the trustees not accepting the bequest the property should go over to the testator's godson; and then suppose the hospital to be broken up before the testator's death: the case, I apprehend, would be exactly analogous to those to which I am about to refer, of the death in the testator's lifetime of the person to whom there is a devise with a condition attached, and an ulterior

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limitation over, in terms dependent for its efficacy upon the happening of that condition—where it has been held that the happening of the condition is not that which gives effect to the ulterior limitation, although in terms it is so expressed; but the condition being something to be done or left undone by the first devisee in respect of the interest which he takes, his death in the lifetime of his testator has simply the effect of accelerating the enjoyment of the estate under the ulterior limitation.

That point seems to have been fully settled by authority, after considerable discussion, in the case of *Jones v. Westcomb* (a), which first came before Lord *Harcourt*. That was a devise “to the child of whom the testator’s wife was enceinte,” and if that child died under twenty-one then over. It turned out that the wife was not enceinte, yet Lord *Harcourt* held that the gift over took effect. The decision was right in effect; but, unfortunately, the reasons were not given: the decision simply was reported. The question was argued several times, and adjudged in various Courts. It was first determined as to the personalty by Lord *Harcourt*. Then the case came for the opinion of the King’s Bench, upon an ejectment brought for the leasehold estate, under the name of *Andrews* dem. *Jones v. Fulham* (b), when the Court gave judgment for the wife. Again it came before the Court of Common Pleas, under the name of *Roe* dem. *Fulham v. Weket* (c), where it was several times argued, and at length it was held, that the devise over never took effect, on the ground that the heir at law was not to be disinherited, except upon strict performance of the condition. Lastly, it came again before the Court of King’s Bench as *Gulliver* dem. *Fulham v. Weket* (d), when it was finally determined in favour of the gift over, Lord Chief Justice *Lee* giving as one reason of

(a) *Prec. Ch.* 316. (b) 3 *Burr.* 1624. (c) *Ib.* (d) *Ib.*

the opinion of the Court, "that the intent of the testator was apparent and express, that the estate should not descend:"—in other words, it was read as if it had been simply a gift to take effect in the event of there being no child who should fulfil the condition of attaining twenty-one of the person supposed to be enceinte.

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The reasons for the decision are very well expressed by Lord *Brougham* in *Mackinnon v. Sewell*(a), a case of the same character, although the gift there was to a class instead of an individual. Lord *Brougham* says, "Almost all the cases are those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened. Thus, a bequest over to A. in case the first takers, the unborn children of B., die before they reach twenty-one, read as a condition, is a bequest to A. if B. has children and they do not live to twenty-one, and the first or affirmative contingency not happening, it follows of necessity that the second or negative must"(b).

That is one way of putting the reason of the decision. It is put less technically by Lord *Mansfield* in *Frogmorton v. Holyday*(c), namely, that the intention of the testator in the first limitation being simply to provide for a child, if any, that object was equally fulfilled if there was no child to take under that first limitation; and therefore the person for whom the testator's bounty was next intended was entitled to have the limitation in his favour accelerated.

Frogmorton v. Holyday was a case similar in character to that of *Jones v. Westcomb*, and what Lord *Mansfield* says is this:—"A question applicable to this part of the

(a) 2 My. & K. 214.

(b) *Ib.*

(c) 3 Burr. 1618.

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argument was pleaded in the days of ancient *Rome* by *Scævola* and *Crassus*, in the famous cause between *Curius* and *Coponius*, and was much agitated in modern times in the Courts of Westminster Hall, in the case of *Jones v. Westcomb* (a). A man, taking for granted that his wife was with child, devised his estate to the child his wife was enceinte of, and if such child died under age then he devised it over. The woman was not with child. The question was, "whether the devisee over should take;" Lord *Mansfield* (with a little sarcasm perhaps) says, "the *Roman* tribunals at once and the *English* at last, finally determined that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it; consequently, no posthumous child having ever existed, the substitute was entitled."

The reporter, in the margin, mentions the cause which Lord *Mansfield* referred to as occurring in *Rome*, and which seems to have made such an impression upon *Cicero* that he has twice referred to it—once in his treatise "*De Oratore* (b)," and once in the "*Oratio pro Cæcina*." The passage in the "*Oratio pro Cæcina*" expresses so clearly the sound sense of the judges before whom the question was brought, that I think it is worth reading:—"Non occurrit unicuique vestrum aliud alii in omni genere exemplum, quod testimonio sit, non ex verbis aptum pendere jus, sed verba servire hominum consiliis et auctoritatibus? Ornate et copiose L. Crassus, homo longe eloquentissimus, paulo ante quam nos in forum venimus, iudicio centumviri hanc sententiam defendit; et facile, cum contra eum prudentissimus homo, Q. Mucius, diceret, probavit omnibus, M'. Curium, qui hæres institutus esset ita, 'mortuo postumo filio,' cum filius non modo non mortuus, sed ne natus

(a) Prec. Ch. 316.

(b) Lib. i. cap. 39

quidem esset, hæredem esse oportere. Quid? verbis satis hoc cautum erat? Minima. Quæ res igitur valuit? voluntas; quæ si tacitis nobis intelligi posset, verbis omnino non uteremur: quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent, voluntatem"(a). That is to say, though it never was, perhaps, better expressed than in that passage, the clear and manifest intent is to prevail.

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The same question came before Lord *Hardwicke* upon two occasions: once in *Fonnereau v. Fonnereau*(b), and again in *Avelyn v. Ward*(c).

Fonnereau v. Fonnereau was the case of a gift to a son for life, with remainder to the issue; and if all the issue should die, then over. The son died having no issue at all, and Lord *Hardwicke* held, that the limitation over took effect.

Avelyn v. Ward was a case very similar to the present. The testator devised his real estate to his brother and his heirs, "on this express condition, that within three months after his decease he should execute and deliver to his trustee a general release in full words of all demands which he might claim on the testator's estate, or any part, for what cause soever. But if his brother should neglect to give such release, the said devise to him should be null and void to all intents, and in such case he devised it to *Richard Ward* and his heirs and assigns for ever." The brother died in the testator's lifetime, so that the condition was not performed; and the devise over was in terms made dependent upon its performance, being only "if his brother should neglect to give a release." The counsel who argued in support of the limitation over,

(a) Pro *Cæcinâ*, cap. 18. (b) 3 Atk. 316. (c) 1 Ves. sen. 420.

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put several cases in which, however the precedent limitation was determined, the limitation over would take effect:— a limitation to one for life, with remainder to his first and other sons in tail, with remainder over, where, though the first son never came in esse, the remainder takes effect; again, a gift to one for life, and after his death over, where, if the life estate is determined by forfeiture, the remainder over is simply accelerated; and he adds, “A gift to a monk, and after his death over, it goes over immediately.” Then he cites *Jones v. Westcomb*, and *Fonnereau v. Fonnereau*. The Lord Chancellor says this:—“The question will very much turn on this, whether this devise over is to be considered, and the contingency on which it is given, as a strict condition or a conditional limitation; for if the former, it would be very difficult to maintain that the second devisee could have the estate but upon a strict breach or nonperformance. If the condition had been performed, or it became impossible by act of God, that cannot be: but if it be a conditional limitation, the consideration is different; and I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place: and I am of opinion this must be so construed”(a). In Lord *Hardwicke's* view, therefore, wherever there is an anterior limitation, with certain events attached to it, and a conditional limitation over upon the happening of those events, if the anterior limitation is out of the case by any means whatsoever, the estate goes over.

I should have mentioned that in *Gulliver dem. Fuller v. Weket*, Lord Chief Justice *Lee* says, it is quite imma-

(a) 1 Ves. sen. 422.

terial whether the first gift be void in its inception, or whether it becomes void in the result. In that case the gift was void in its inception, being a gift to a nonentity, —a child that did not exist.

Mr. *Fearne* had to consider these decisions in his "Cases and Opinions," in reference to a case where the first limitation was upon trust for the first son of D. who should attain twenty-five, with ulterior limitations over. He says :—"As to these subsequent limitations, they were trusts to arise out of the same legal remainder in fee in the trustees, as the preceding trust for the first son of D. attaining the age of twenty-five. But, though the trust for such first son attaining that age was contingent, yet, as the estate so intended for such son did not extend to the *whole fee simple*, the subsequent trusts do not appear to me necessarily to be bound by, or depend on, the same contingency. I think they may be considered as trusts taking immediate effect in interest, or out of the legal estate in the trustees, subject to the preceding charges and the contingent estate to the first son of D. attaining the age of twenty five ; insomuch that if D. had died without issue I do not see why they might not have taken effect ; and if they may be considered as vested, subject to such intervening contingent limitation to the first son of D. attaining twenty-five years of age, supposing it good, and that intervention is found to be, or becomes, void, it seems to be as much out of the way as if it never had taken effect and were determined"(a). Therefore, his first opinion was, that though the present limitation was void by operation of law, the law not allowing such a contingency, yet, that limitation being out of the way, the subsequent limitation would take effect. In a later opinion in the same volume he has occasion to alter this opinion as to the result of the special circumstances of the case ; but his opinion remains unaltered upon the point for which I

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(a) *Fearne's Posthumous Works*, 287, 288.

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have referred to it, namely, that the circumstance of the preceding limitation being void by operation of law did not affect the question as to the efficacy of the limitation over, the result being the same as if the preceding limitation had been void by reason of the testator's mistake in giving it to a child not in existence.

Looking through the authorities to which I have referred, I find various reasons assigned for the decisions at which the Courts arrived; but all tend to the same result as is expressed in the passage I read from *Cicero*, viz. that the intention of the testator is that by which the decision must be governed; and there is no possible reason to be assigned for supposing the testator to have desired the limitation over to take effect in the event of the preceding limitation failing in one particular way, but not to take effect in the event of the preceding limitation failing in some other way. If it were a simple collateral condition, and that condition were not performed, the contingency, on the happening of which the estate was limited over, would have failed, and in that case the limitation over would be gone, and nothing could save it.

I have considered the question repeatedly since the case was argued, but I cannot see any substantial distinction between the cases to which I have referred, of a devise over after a devise to a nonentity, if the nonentity should die under age, or again, of a devise over, after a devise to a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity which cannot take, followed by a devise over in the event of that charity which cannot take omitting to perform a certain act. The cases seem to me identical in principle. The reason applicable to the one must apply to the other, and must lead to the conclusion that this is not to be read as a strict condition but as a conditional limitation; and, as



Lord *Hardwicke* says, the prior limitation being out of the case, the subsequent limitation is to take effect.

I have, however, been embarrassed by the decision of the late Vice-Chancellor of *England* in *The Attorney General v. Hodgson* (a), and that of the Master of the Rolls in *Philpott v. St. George's Hospital* (b).

In the former, I observe that the cases to which I have been referring,—*Avelyn v. Ward* and others of that class,—do not appear to have been cited. The argument against the validity of the devise is very shortly reported, but several cases appear to have been cited in support of that contention, such as *The Attorney General v. Tyndall* (c), *The Attorney General v. Whitchurch* (d), and others, which only go to this extent, that, where the primary object fails, an object attached to it fails also. The bequest, however, was a bequest of residuary personalty, “in trust for the establishment of an institution or a charitable receptacle, if the same can be done, for twenty-seven poor old men; but if no such institution can conveniently be established, I request that the same may be disposed of in charitable donations to persons of the same description.” It was argued on demurrer, and I observe the Vice-Chancellor remarks, that there is nothing averred in the bill as to whether such a receptacle could or could not be conveniently established. I do not think that would affect the question of the gift being void by the Statute of Mortmain. What he says, however, is this:—“It appears to me that the primary object” of the testator “was the acquisition of a dwelling place for fifty-four people; and that it was only in the event of that object not being capable of accomplishment that he makes the general disposition over. And, in my opinion, that general disposition over cannot be said to

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(a) 15 Sim. 146.

(b) 21 Beav. 134.

(c) 2 Ed. 207.

(d) 3 Ves. 141.

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have taken effect, for there is no allegation about it. Besides which, the testator seems to point at some physical impediment which might disappoint his first purpose."

Now, that seems to me to amount to a conclusion, that although the testator expressly directs, that, if a bequest to a charity cannot take effect, for some particular reason which he assigns, in the mode in which it is directed, a gift over shall take effect; yet if the Court is of opinion that the first bequest is prevented from taking effect, not on account of the particular reason mentioned by the testator, but because the law forbids it, the gift over must fail also. I cannot myself feel satisfied with that reasoning. I think the case before me is somewhat different, as well from *The Attorney General v. Hodgson* as also from that which I am about to notice of *Philpott v. St. George's Hospital*. The testator in this case having appointed his godson to be "one of the said trustees" as he calls them, at the same time directing, that, if others are not appointed, he is to be the person who is to take the whole, the estate, as it were, becomes vested in the godson if there are none others to come in competition with him. I think, therefore, there is a somewhat stronger indication of will in the case before me than there was in *The Attorney General v. Hodgson*; but I do not wish to put it higher than that.

I ought to notice, that, in *The Attorney General v. Hodgson*, I do not see any reference made to the case of *Grimmett v. Grimmett*(a), which, I think, would have had considerable bearing upon the contingency "if no such institution can conveniently be established" occurring in that case. In *Grimmett v. Grimmett* the trust was singularly worded. The property bequeathed for charitable purposes was to stand in the name of trustees "until the whole could

(a) 1 Amb. 212.

be laid out in the purchase of land to the satisfaction of the governors and trustees" whom the testator appointed, and the proceeds of the property or the rents of the lands to be purchased therewith were given to the charity. Lord *Harwicke* treated it as a discretionary power in the trustees to lay the money out one way or the other, either in the funds or in lands, and applying the principle of *Sorresby v. Hollins*(a), followed by Lord *Eldon* in *The Attorney General v. Parsons*(b), he held it to be good, inasmuch as the trustees had power under the will to lay out the money in a way which the law allowed(c). He says "The direction is to place the money in the funds until laid out in lands to the satisfaction of the trustees. When can that be? Not while the statute is in force. Suppose it had been 'till by law it may be;' such a bequest would have been good. Those words must mean, when the trustees approve of laying it out; and that cannot be while the statute is in force: it would be to act contrary to their trust"(d). These observations go far to show that an act contrary to the Statute of Mortmain would be an act which could not be "conveniently done" within the meaning of the will in *The Attorney General v. Hodgson*, and consequently, that, in that case, the alternative bequest should have taken effect.

1858.
WARREN
v.
RUDALL,
HALL
v.
WARREN.
—
Judgment.

In *Philpott v. St. George's Hospital*, in which *The Attorney General v. Hodgson* was followed, the Master of the Rolls says:—"When I first read the words of this will my impression was very strong, that the meaning of them was, that, if the first object failed, *from any cause whatever*, the gift to *St. George's Hospital* took effect; and that the failure to supply the land for the almshouses might arise as well from the operation of law as from the want of inclination on the part of any person to give a suitable

(a) 9 Mod. 221.

3 K. & J. 591.

(b) 8 Ves. 186.

(d) 1 Amb. 213.

(c) See also *Carter v. Green*,

1858.
 WARREN
 v.
 RUDALL,
 HALL
 v.
 WARREN.
 —
Judgment.

piece of land as the site of the almshouses,"—using almost the very words of Lord *Hardwicke* in *Avelyn v. Ward*(a), where he says he never knew a case of remainder or conditional limitation over, but, if the precedent limitation "by what means soever" was out of the case, the subsequent limitation took effect. That, however, he says, would not be consistent with *The Attorney General v. Hodgson*; and, upon further consideration of that case, he thought his first impression was too hastily framed, and held that the event of the first limitation failing by the operation of the law of mortmain was not one of the events on which the testator intended the second limitation to take effect. The case was appealed; but by the decision of the House of Lords the determination of this particular point became immaterial.

That case was very similar in most of its circumstances to the present; and the difficulty that I have felt in determining the present has been mainly occasioned by the decisions in *The Attorney-General v. Hodgson* and *Philpott v. St. George's Hospital*; but notwithstanding the great diffidence which I must feel when my opinion is in opposition to two such judges as those by whom the causes in question were decided, I cannot conscientiously bring my mind to the conclusion, that the first of these limitations failing by operation of law, the limitation over ought not to take effect in the same way as if the first limitation had been to a nonentity or to a person dying in the lifetime of the testator.

As to the question that might be raised upon the limitation over, whether a gift over in the event of the previous gift being void by the law of mortmain, must not be taken to have been intended "in terrorem," as Lord *Northington* expressed it in *The Attorney-General v. Tyndall*(b), and therefore void as being in fraud of that law, that point was finally settled in *De Themmines v.*

(a) 2 Eden, 207.

(b) 1 Ves. sen. 422.



De Bonneval(a). There the gift over was limited, in so many words, to take effect "if the previous trusts, or any of them, should by any Court of law or equity be adjudged to be void, or incapable of being performed or carried into effect." The *Attorney-General* was expressly directed to be a party, the Master of the Rolls declining to decide it in his absence. Counsel was heard for the Crown, and yet it was held that the gift over took effect.

1858.
WARREN
v.
RUDALL,
HALL
v.
WARREN.
—
Judgment.

In this case, I think the result is the same as if the gift had been a gift of personalty to a lying-in asylum existing at the date of the will, but ceasing to exist before the testator's death, coupled with a direction, that, if the committee did not choose to accept it within a given time, it should go over. That would have been precisely *Avelyn v. Ward*; and I can see no substantial difference between such a state of circumstances and a case where, as here, the Legislature interposes and says, "from the moment of the testator's death this gift is void."

I have felt greater difficulty in this case than, I may almost say, in any I have yet had to decide; but I hold that, upon the will in question, there is a valid gift of the whole of this property to the godson.

DECLARE, that the testator's godson *W. Hall Warren* is entitled, to his own use, to the residuary real and personal estate of the testator, including the several gifts over of the freehold and leasehold messuages and hereditaments in the will devised to the trustee or trustees of the maternal asylum.

*Minute of
Decree.*
—

(a) 5 Russ. 288; see also 3 K. & J. 601.

1858.

ASKEW v. THOMPSON.

July 22nd &
29th.

*Will—Con-
struction—Di-
rection to pay
another's Debts
—Whether In-
terest payable.*

Direction in a will to pay and discharge all the just and lawful debts owing by a deceased brother at the time of his death:—
Held, upon the terms of the will, and looking to the circumstance that the brother had been dead about forty years at the date of the will, to comprise debts, but not interest.

MARY ASKEW, by her will, in 1848, devised and bequeathed her residuary real and personal estate and effects to her executors, upon trust to sell and convert the same; and then proceeded to declare the following trust of the moneys to arise from such sale and conversion:—"I declare that the said executors shall, by and out of such moneys, pay and satisfy my funeral and testamentary expenses and debts, and the pecuniary legacies hereinbefore bequeathed; and do and shall, in the next place, pay and discharge all the just and lawful debts owing by my late brother *John Askew* at the time of his death; and do and shall pay the residue, if any, of the said moneys to my niece *Sarah Askew*." Then, after devising her mortgage estates and appointing her executors, she devised as follows:—"And I authorise the acting executors or executor for the time being of this my will, to satisfy any debts claimed to be owing by me or my estate, or by my said brother *John Askew*, deceased, at the time of his death, and any liabilities to which I, or my estate, or the said *John Askew*, deceased, may be alleged to be subject, upon any evidence they or he shall think proper."

At the date of the will *John Askew* had been dead for about forty years. Some of his creditors held promissory notes, by which he had secured the principal moneys due to them respectively, with interest at five per cent.

In the administration of the estate of the testatrix under a decree of the Court, a question arose as to the interest payable upon *John Askew's* debts.

Mr. James, Q. C., and Mr. Bagshawe, jun., for certain of *John Askew's* creditors having promissory notes bearing interest, contended that they were entitled to interest from the time of his death upon the amounts then due upon such notes respectively.

1858.
ASKEW
v.
THOMPSON.
—
Argument.

The interest of a debt is as much a part of the debt as the principal sum :—Per Sir *William Grant* in *Aston v. Gregory* (a). The effect of such a bequest as this is to put the testatrix in the position of the deceased debtor : *O'Connor v. Haslam* (b).

Shirt v. Westby (c) is distinguishable, for there the estates were charged with the payment of certain sums which were specified in the will.

Mr. Willcock, Q. C., and Mr. *J. Hinde Palmer*, for *Sarah Askew*, contended that *John Askew's* creditors were not entitled to any interest during the life of the testatrix, nor during the first year after her decease.

The words are, “debts owing by my late brother *John Askew* at the time of his death.” Those words cannot have been intended to pass interest on such debts. At any rate they cannot have been so intended in a will made more than forty years after his decease. Had the testatrix intended to give, in the form of interest, more than twice as much as the principal, she would have expressed her meaning more clearly.

Mr. James, Q. C., in reply :—

The words “at the time of his death” were inserted to show clearly that the Statute of Limitations was not intended to be a bar. Then the word “satisfy” is used,

(a) 6 Ves. 151. (b) 5 H. L. C. 178, 179. (c) 16 Ves. 396.

1856. and these debts will not be satisfied unless interest be
 ASKEW paid.
 v.
 THOMPSON. [Foster v. Ley^(a), and Sowerby's Trust^(b), were also
 Argument. cited.]

THE VICE-CHANCELLOR reserved judgment until the record in *Aston v. Gregory* should be examined.

July 29th. VICE-CHANCELLOR SIR W. PAGE WOOD (after reading
 Judgment. the will as above, proceeded as follows:—)

The question I have to determine is, whether these directions in the will of the testatrix relative to the payment of her brother's debts, amount to a direction to pay interest upon those debts from the date of her brother's death, her brother having been dead nearly forty years at the date of her will.

Two cases were cited in reference to this question, *O'Connor v. Haslam*^(c) and *Aston v. Gregory*^(d). The observations cited from the former were directed to another point, and have no bearing upon that before me. But as regards the latter, which was before Sir William Grant, I was desirous to have the record examined before determining this case, in order to ascertain how far the will, as stated in the report, corresponds with the statement of it on the record. This has now been done, and I find the two to correspond exactly.

The will in *Aston v. Gregory* was peculiarly worded. The direction was "to give and apply the moneys," produced by a sale of the testator's estates, "to and among

(a) 2 Bing., N. C., 269.

(b) 2 K. & J. 630.

(c) 5 H. L. C. 170.

(d) 6 Ves. 151.

such persons" as the trustees, in their discretion, "shall think had or have any just or indisputable demand upon" the debtor in question "at the time of his death, and giving to each such person in equal degree, in proportion according to the principal sum which may appear to be due to them respectively, as far as the money arising by such sale or sales will extend." It was not, as here, a direction to pay debts owing by the debtor at the time of his death, but it was, in effect, a direction to distribute a certain sum of money among such persons as the trustees should consider to have been creditors at the death, in proportion to the principal moneys due to them respectively. The testator does not say debts at the death, but creditors at the death; and there is nothing in the will to define whether the principal money due, or principal and interest, was to be paid, beyond the direction to distribute among persons having "any just or indisputable demand" on the debtor. Sir *William Grant's* observation, that "the interest of the debt is just as much a part of the debt as the principal sum," certainly seems to be a dictum in favour of the contention, that a direction to pay another's debts is a direction to pay them with interest. But, in construing the will before me, I am bound to look at all the words; and here the direction is not to distribute a certain sum among persons who were creditors at the death, but to pay the debts owing at the death; and, looking to the circumstance that at the date of the will the brother had been dead nearly forty years, the construction for which the creditors contend would entitle them in that period, at five per cent., which some of the securities carried, to more than twice as much by way of interest as the principal moneys due to them.

It is true, that in the latter clause of the will the testatrix authorises her executors to pay and satisfy "any liabilities" to which her brother may be alleged to be subject, without

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 ASKEW
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 —
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 ASKEW
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 —
Judgment.

adding, at his death; but she had twice previously spoken of debts owing by him at the time of his death; and being of opinion that in those previous passages she meant what was due at the death, and not what accrued due subsequently to the death in respect of interest,—and, looking to the length of time the brother had been dead at the date of her will, I do not think the omission in the subsequent clause to repeat the words “at the time of his death” sufficient to justify me in saying that any interest is to be paid upon the moneys owing by the deceased brother at the time of his death, until the expiration of a year from the death of the testatrix.

I look upon the direction as amounting to a bequest of so many sums of money, which would carry interest at four per cent. from the expiration of a year after the death of the testatrix.



July 5th & 6th.

HORTON v. SMITH.

*Mortgage—
 Payment of, by
 Tenant in Tail
 in Remainder
 —Merger.*

Tenant in tail
 in remainder
 expectant upon
 a preceding
 estate tail,
 purchased a
 mortgage on
 the estate and
 took an assign-
 ment to him-
 self of the mortgage debt and of the term by which it was secured.

He subsequently became entitled to the estate as tenant in tail in possession, and as such continued for six years in receipt of the rents; after which he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge:—*Held*, that the charge was kept alive for the benefit of his personal representative.

Distinction in this respect where tenant in tail becomes entitled to the charge without any act on his part.

Dictum of Sir *W. Grant* in *Forbes v. Moffatt* (18 Ves. 393) explained.

IN the year 1828, real estates stood limited to mortgagees for a term of 500 years, to secure £2700, with interest at five per cent., and subject thereto, to *William Horton* in tail, with remainder to *John Horton* in tail, with remainder to the Defendants in fee.

In the same year, the estates standing thus limited, *John Horton* purchased the mortgage, and took an assignment to himself of the debt and of the term by which it was secured.

William Horton paid interest on the mortgage debt until December, 1850, when he died without issue.

1858.

HORTON

v.

SMITH.

Statement.

Thereupon *John* entered as tenant in tail, and as such continued to receive the rents, which were more than sufficient to keep down the interest, until December, 1856, when he died intestate and without issue. He had not barred the entail, or done any other act indicative of an intention as to whether the charge should merge.

The Plaintiff, as his administrator, now filed his bill, seeking to have it declared that the £2700 was a subsisting charge on the estate, and for payment of the same with interest.

Mr. *Rolt*, Q. C., Mr. *Shapter*, Q. C., and Mr. *W. Hislop Clarke*, for the Plaintiff, contended that, *John Horton* being, at the time when he purchased the charge and took an assignment of the mortgage term, tenant in tail in remainder expectant upon a preceding tenancy in tail, the Court would infer that he meant to keep the charge alive for the benefit of his personal estate; since at that time his estate tail was liable to be defeated by the birth of issue, who would have taken under the preceding estate tail: *Wigsell v. Wigsell*(a); Story's "Equity Jurisprudence," § 486.

Argument.

Mr. *Willcock*, Q. C., and Mr. *Wickens*, for the Defendants, contended that the charge had merged for the benefit of the estate. After *John Horton* became tenant in tail in possession, he might at any time have acquired the fee simple; and had he done so, the remedy and the right being in the same person, the charge must have been at an end. At that time, it was perfectly immaterial to him whether the charge was or was not a subsisting charge; and where it is indifferent to the party in whom the interests are united whether the charge shall subsist, the charge sinks

(a) 2 S. & S. 369.

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 HORTON
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 Argument.

for the benefit of the estate:—Per Sir *William Grant* in *Forbes v. Moffatt* (a).

In *Wigsell v. Wigsell* there was an intervening term of 500 years between that by which the mortgage in question was secured and the estate tail. There, also, the lady by whom, when tenant in tail in remainder, the charge was paid off, was not in possession for more than a year; whereas, in this case, *John Horton* having remained for six years in possession of the estate tail, the Court will presume that he intended the charge to sink for the benefit of the estate, without searching for any further expression of an intention on his part that such a result should take place.

Besides, if any such expression be required, it is furnished by the circumstance of his having taken the assignment of the mortgage term, not to a trustee, but immediately to himself; and, inasmuch as he must have known, that, in the event of his estate tail being vested in possession, the effect of such an assignment would be a merger of the term, the inference is inevitable that he intended that result.

[The following cases were also cited, in addition to those mentioned in the judgment:—*Grice v. Shaw* (b), *Donisthorpe v. Porter* (c), *Duke of Chandos v. Lord Talbot* (d), *Chester v. Willcs* (e), *Astley v. Milles* (f), *Drinkwater v. Combe* (g), *Whittle v. Henning* (h), *Earl of Clarendon v. Barham* (i), *Blundell v. Stanley* (j), *St. Paul v. Lord Dudley & Ward* (k), *Burrell v. Lord Egremont* (l), *Lord Buckinghamshire v. Hobart* (m), *Jones v. Morgan* (n), and *Hood v. Phillips* (o).]

A reply was not heard.

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|--------------------|-----------------------------|----------------------|
| (a) 18 Ves. 393. | (f) 1 Sim. 298. | (k) 15 Ves. 173. |
| (b) 10 Hare, 76. | (g) 2 S. & S. 340. | (l) 7 Beav. 205. |
| (c) 2 Eden, 162. | (h) 2 Phill. 731. | (m) 3 Swanst. 186. |
| (d) 2 P. Wms. 601. | (i) 1 Y. & Coll. C. C. 688. | (n) 1 Bro. C.C. 206. |
| (e) Amb. 246. | (j) 3 De G. & Sm. 433. | (o) 3 Beav. 513. |

VICE-CHANCELLOR SIR W. PAGE WOOD :—

1858.
HORTON
v.
SMITH.
July 6th.
Judgment.

Whatever discrepancy may exist between the earlier and the later authorities, it is clear, according to the latter, that in all cases of a tenant in tail *in possession* paying off a charge upon the estate, unless he indicates, at the time of making the payment, or at all events subsequently, an intention to the contrary, it will be assumed that he intended such payment for the benefit of the estate. But I am not aware of any case in which it has been determined, that, where a tenant in tail *in remainder* pays off a charge before he becomes entitled in possession to the estate, the charge shall sink for the benefit of the estate.

The rule is clearly stated by Lord *Eldon* in *Ware v. Polhill*(a) :—"If a tenant in tail, adult, pays off a mortgage, or becomes entitled to a charge, as he might acquire (as the Court is in the habit of saying, somewhat inaccurately) the absolute ownership, a presumption arises that his intention was not to keep alive the charge." The same expression is used by Sir *Anthony Hart* in *Astley v. Milles*(b), and by Lord Justice *Turner*, when Vice-Chancellor, in *Grice v. Shaw*(c). But it is always put as the case of a tenant in tail *in possession* paying off or becoming entitled to a charge.

The present case is more analogous to that of *Wigsell v. Wigsell*(d) than to any other. Here *John Horton*, by whom the mortgage was paid off, was tenant in tail in remainder expectant upon a preceding estate tail in *William Horton*. *John Horton* paid off the mortgage debt and took an assignment of the term by which it was secured in the lifetime of *William*. *William* subsequently died without issue; *John* became tenant in tail in possession, and remained tenant in tail in possession for a period of six years—which is not altogether an unimportant

(a) 11 Ves. 277.

(b) 1 Sim. 298.

(c) 10 Hare, 76.

(d) 2 S. & S. 364.

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 HORTON
 v.
 SMITH.
Judgment.

consideration—but beyond that nothing further was done by him.

There is a difference, no doubt, between the case of a tenant in tail in remainder becoming entitled under a will or otherwise, and without any act on his own part, to a charge on the estate, and cases where he has entitled himself to the charge by an actual payment made by himself. In the former case, if the estate ultimately devolves upon him, and he expresses no intention as to whether the charge should sink or not for the benefit of the estate, it being indifferent to him which of those results should follow, the case arises to which Sir *William Grant* refers in *Forbes v. Moffatt*(a), as being the principle of the decision in *Wyndham v. The Earl of Egremont*(b). He says, "In *Wyndham v. The Earl of Egremont*, what the counsel for the personal representatives contended was, that the charge should not merge, unless at some period in Lord *Thomond's* life it was indifferent to him whether the term should be kept on foot or not." (That was a case like *Trevor v. Trevor*(c).) "Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united whether the charge should or should not subsist, and in that case I have already said it sinks."

The last observation has occasioned me more doubt in the consideration of the present case than any other dictum (for authority there is none except *Wigsell v. Wigsell*). But Sir *William Grant* is there speaking, not of a charge which the tenant in tail has created in his own favour by an actual advance of money, but of a charge created by some third person, and as to which the tenant in tail has never, either before or after the estate tail became vested in him in possession, expressed any intention whatever as to

(a) 18 Ves. 390. (b) Amb. 753. (c) 2 My. & K. 675.

whether it should or should not be kept alive. In such a case, Sir *William Grant* says, it being a matter of perfect indifference to the tenant in tail whether the charge is or is not kept alive, in the absence of any indication at any time of his intention on the subject, the Court will assume that the charge was meant to sink for the benefit of the estate. But here, as in *Wigsell v. Wigsell*, I find, at the time when the person became entitled to the charge, a clear indication of his intention that the charge should be kept alive. He entitles himself to the charge by advancing the money himself, and that at a time when the preceding estate tail is still subsisting, and he is only tenant in tail in remainder. And in that state of circumstances it is as consistent with all the authorities as it is with common sense, to hold that the act of the party in advancing the money and purchasing the charge was a clear and distinct indication that at that time he intended the charge to be kept alive.

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 HORTON
 v.
 SMITH.
 —
Judgment.

The only distinction which I can discover between the case of *Wigsell v. Wigsell* and the present is this:—In *Wigsell v. Wigsell* the estates had been devised, subject to the mortgage in question and to the term by which it was secured, for a term of 500 years, upon trust to raise money for payment of the testator's debts, and of a sum of 1500*l.* to the lady by whom, when tenant in tail in remainder, the mortgage in question was eventually paid off. It was agreed that her intervening charge of 1500*l.* did not affect the question, and, the testator having been dead some eighteen years, no one seems to have relied upon the intervening term for any other purpose than as an argument to show that there could be no merger. That being so, I find it difficult to bring my mind to bear upon the argument as to the effect of the intervening term; for it is clear, on the authority of *Forbes v. Moffatt* and that class of cases, that the mere technical circumstance of merger taking place cannot affect the question. In *Forbes v.*

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HORTON

v.

SMITH.

Judgment.

Moffatt, Sir William Grant says, "Upon this subject a Court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged." And in *Lord Compton v. Oxenden*(a), there was an outstanding term as security for the charge; but notwithstanding the person entitled to the charge and seised in fee of the estate was lunatic, and could not, therefore, express any intention upon the subject, still, he being seised in fee of the estate, and having in himself at once the remedy and the right, the two were held to be united; and, although the term was actually outstanding, it was held, that, as the tenant in fee could not in his lifetime have a charge against his own estate, that charge could not be raised for the benefit of his personal representatives.

One other circumstance was relied upon in the argument as distinguishing the case of *Wigsell v. Wigsell* from the present. There the lady by whom, when tenant in tail in remainder, the charge was paid off, was not in possession of the estate for more than a year, whereas, in this case, *John Horton* was for six years in possession of the estate; and it was argued, that the mere circumstance of the mortgagee of an estate coming into possession of the estate as tenant in tail, and remaining six years in possession without doing anything further to indicate an intention either way, is sufficient indication that he intended the charge to be at an end. But, at the time when he purchased the charge, *John Horton* was tenant in tail in remainder; and, purchasing the charge in that state of circumstances, he did by that very act indicate a clear intention that the charge should be considered as a debt due to his personal estate; and if that clear indication of intention is to be held to have been revoked by the circumstance of his having afterwards become entitled to the estate as tenant in tail in possession, and remained so entitled for more than five years, the

(a) 2 Ves. jun. 261.

same presumption would arise in a case where a person, having a similar charge, becomes subsequently tenant in tail of the estate, and dies in *India*, or some distant part of the world, without having ever become aware that he was so entitled. Besides, as Lord *Eldon* pointed out, a tenancy in tail cannot be converted into an estate in fee in a moment, but requires time, and the tenant in tail may have died before a recovery could be suffered or the estate disentailed. Both these are inconveniences against which the decision of Sir *John Leach* in *Wigsell v. Wigsell* appears to guard.

1858.
 HORTON
 v.
 SMITH.
 Judgment.

The ground of the decision in *Wigsell v. Wigsell* is clear, from the form in which the case of the unsuccessful party was put in argument. It was assumed in argument, and necessarily assumed by their counsel, that it makes no difference whether the estate or the charge first vests ; but that view was thus met by Sir *John Leach* :—"Where a tenant in tail *in possession* pays off a mortgage and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases, because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail *in remainder*, whose estate may be altogether defeated by the birth of issue of another person ; and it must be inferred that such a tenant in tail means to keep the charge alive. When *Susannah Wigsell*, therefore, became tenant in tail in possession, this charge subsisted as a part of her personal estate ; and not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her personal estate at her death, and that the Plaintiff is entitled to the relief which she prays."

Wigsell v. Wigsell has long been considered as sound law. There has been no appeal from the decision ; and it appears to me that I should be unsettling the law upon the

1858.

Horton

v.

Smith.

Judgment.

subject if I were to rely upon the minute distinctions to which I have referred, and which Sir *John Leach* treated as immaterial.

One other argument was advanced on behalf of the Defendants, and it is the most ingenious way in which their case can be put. It was said, that in this case the tenant in tail *has* expressed an intention that the charge should sink; that the best way of judging of his intention is to look to the legal effect of his acts: knowing that he was tenant in tail in remainder after a previous estate tail in another person, he has taken this mortgage to himself instead of taking it to a trustee. He must have known that the effect of taking the mortgage in that form would be a merger of the charge in the event of his becoming tenant in tail in possession; and, therefore, having taken the mortgage in that form, he must be looked upon as having intended to bring about that result. But I think it would be an extreme refinement, in a case of this description, where there was an intervening estate tail actually subsisting at the time when the payment was made, to attribute such an intention as this to the party making it, upon the mere ground of his having taken the assignment of the term to himself instead of taking it to a trustee. I think neither that nor any other circumstance of the case is sufficient to distinguish it from that of *Wigsell v. Wigsell*, which, in my opinion, has settled the law upon this subject. It is referred to in text books, and I apprehend the practice is founded upon it.

There will be a declaration that the 2000*l.* is a subsisting charge on the estate, and that the same, with interest at five per cent. from the death of *John Horton*, and the Plaintiff's costs of the suit, ought to be raised by a sale of the estates.

Decree accordingly.

1858.

SCOTT *v.* LORD HASTINGS,
BEAVAN *v.* MACQUEEN,

July 30th.

AND

LORD HASTINGS *v.* BEAVAN.

PRIOR to the year 1857, *Beavan* being equitably entitled to certain stock then standing in the names of trustees in trust for him, a judgment was recovered against him by Lord *Hastings* for the sum of 7738*l.* 3*s.* 6*d.*

*Equitable Chose
in Action—
Mortgage of—
Judgment—
Charging Order
under 1 & 2
Vict. c. 110—
Priority—
Notice.*

On the 30th of December, 1857, *Beavan* executed an assignment, by way of mortgage, of his equitable interest in the stock, to the Petitioner *Clarissa Thackthwaite*, to secure 3200*l.* and interest.

A judgment creditor will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding such creditor has, since the mortgage, but before notice thereof to the trustee of the fund, obtained, under the 1 & 2 Vict. c. 110, s. 14, an order charging the fund.

On the 9th of June, 1858, no notice having been given of the mortgage to the trustees of the stock, Lord *Hastings* obtained an order that two sums of 1624*l.* 11*s.* 2*d.* and 1916*l.* 2*s.* 3*d.* Consols, forming part of the stock comprised in the mortgage to the Petitioner, and since transferred into the name of the Accountant-General in trust in the second cause above mentioned, should stand charged with the payment to Lord *Hastings* of the amount of his judgment debt and interest, unless *Beavan* should, within one month after service of the order, show cause to the contrary; and it was ordered, that no part thereof should be transferred without notice to Lord *Hastings*, until the said order should be made absolute or discharged.

In such a case, the rule in *Dearle v. Hall* (3 Russ. 1) does not apply in favour of the judgment creditor.

Observations on *Watts v. Porter* (2 Ell. & Bl. 743).

On the 16th of June, 1858, on the application of the Petitioner *Clarissa Thackthwaite*, it was ordered that no part of *Beavan's* interest in the last-mentioned Bank Annuities should be dealt with without notice to the Petitioner.

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 Statement.

The Petitioner prayed, that, notwithstanding the orders of the 9th and 16th of June, 1858, the 1916*l.* 2*s.* 3*d.* and 1624*l.* 11*s.* 2*d.* Consols might be sold, and that the proceeds, after providing for certain costs, might be paid to the Petitioner towards discharge of the 3200*l.* and interest due on the security of her mortgage.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Cole*, for the Petitioner, contended that her mortgage was entitled to priority over the alleged charge of Lord *Hastings*, notwithstanding the order nisi obtained by the latter.

Even if the order could be treated as an order absolute, and as amounting to a valid charge on the fund, it must rank subsequently to the mortgage to the Petitioner, that mortgage being prior in point of date; but, in fact, the order was but an order nisi; and by the 15th section of the Act 1 & 2 Vict. c. 110, the effect of an order nisi is merely to prevent the judgment debtor from making any future disposition of the fund in question after the date of the order: *Warburton v. Hill*(a).

Mr. *Freeling*, for Lord *Hastings*, contended that, under the circumstances of the case, the charging order obtained by Lord *Hastings*, on the 9th of June, must be treated as having become absolute, and a valid charge on the fund, before the Petitioner had perfected her security. The month allowed for showing cause against the order had expired, and, although within that period the Petitioner had obtained the stop order of the 16th of June, Lord *Hastings* had previously obtained a similar order, the effect of which was to prevent the order obtained by the

(a) *Kay*, 470.

Petitioner from having the effect of perfecting her mortgage before the charging order had become absolute.

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Argument.

Then, Lord *Hastings* having obtained an absolute charge, when, as yet, the mortgage of the Petitioner was merely an inchoate right, his judgment debt was entitled to priority. By the 14th section of the Act, the effect of a charging order is to entitle the judgment creditor to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor; and had this charge been made by the judgment debtor, it must have taken precedence of that of the Petitioner, who had given no notice of her security: *Watts v. Porter* (a).

Mr. *Rolt*, Q. C., in reply:—

The decision in *Watts v. Porter* has been disapproved of in *Beavan v. The Earl of Oxford* (b), both by Lord *Cranworth*, C., and by Lord Justice *Turner*, who adopted the view taken in the former case by *Erle*, J., that a mortgagee, claiming under a mortgage made subsequently to a judgment but prior to the charging order, should be preferred to the judgment creditor, notwithstanding he had omitted to give notice of his mortgage. Upon executing the mortgage the debtor lost his equitable interest in the fund; and, by the 14th section of the Act, it is only as to stock standing in the name of the debtor, or in trust for him, that the order operates as a charge.

Notice is immaterial where, as here, the question is not between two assignees, but between an assignee and a judgment creditor, for the latter does not give credit upon the faith of the particular stock being the property of his debtor.

(a) 3 Ell. & Bl. 743.

(b) 6 D. M. G. 524, 525, 532.

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[*Brearchliffe v. Dorrington*(a) and *Kinderley v. Jervis*(b)
 were also cited.]

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Of the two questions arising upon this petition, if the first be decided in favour of the Petitioner, the second will not require a decision.

The first question is, whether, if a person, beneficially entitled to stock standing in the names of trustees, has a judgment recovered against him, and the judgment creditor obtains a charging order to give effect to his judgment, an assignee claiming under a mortgage of the fund, made subsequently to the judgment, but before the charging order, shall have priority over the judgment creditor, the mortgagee not having given notice of his security.

This question will depend upon whether, at the time when the charging order was made, the fund in question was standing in the name of any person as trustee for the judgment creditor, for, by the 14th section of the Act(c), the charging order has no operation, except upon stock or shares standing in the name of the creditor in his own right, "or in the name of some person in trust for him;" and the only effect which the Act gives to the charging order is, that it "shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." The question, therefore, is whether, at the date of the charging order, the fund was standing in the name of any person in trust for the judgment debtor,

(a) 4 De G. & Sm. 122. (b) 22 Beav. 1. (c) 1 & 2 Vict. c. 110.

he having previously executed a mortgage of his equitable interest in the fund, but no notice having been given of that assignment to those in whose names the stock was standing.

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—
Judgment.

Where a person, having an equitable interest in stock standing in the name of a trustee, assigns his interest, and the assignee, by giving no notice of the transaction to the trustee, enables the assignor to make a fresh assignment to a third person, who, upon the faith of the assignor's being entitled to the stock, advances his money, and obtains a charge, there, according to *Dearle v. Hall*(a), *Loveridge v. Cooper*(b), and that class of cases, the first assignee shall be postponed, because, by omitting to give notice of his charge, he has enabled the assignor to deal with the fund as if he were still the owner, and thus to commit a fraud upon the subsequent assignee. But that reasoning does not apply to a case like the present. Here the judgment creditor placed no reliance upon the circumstance of the debtor being entitled to this specific property. He is simply a creditor who has given a general credit to the debtor, and it is not until he procures the charging order that he seeks to obtain an interest in the stock in question. Where the judgment debtor is the sole owner of stock standing in his own name, or in the name of another in trust for him, there the Legislature intended, by the Act in question, to prevent him, *after* his creditor has obtained an order charging the fund, from dealing with the fund to the prejudice of the creditor who has obtained that charging order. But here, before the charging order was obtained, the debtor had ceased to be the sole owner of the stock. The case is not within the intention of the Act. The intention of the Act was to give to the creditor all that interest in the stock charged by the order which the debtor

(a) 3 Russ. 1.

(b) Id. 30.

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 —
Judgment.

had when the order was obtained; and to carry out that intention it is not necessary to give him what the debtor had not, but had disposed of.

Such is my view of the law upon the first question; and even if the charging order had been made absolute before notice of the mortgage, it would be impossible for me to give priority to the charge of the judgment creditor, without disregarding the dicta in the case of *Beavan v. The Earl of Oxford*(a), in reference to the decision of the Court of Queen's Bench in *Watts v. Porter*(b). It is true they are but dicta, for the facts in *Beavan v. The Earl of Oxford* are distinguishable from the present, the charge there being a charge on land. Nevertheless, they are the dicta of a superior Court, and Lord *Cranworth* expressly and decidedly preferred the view taken in *Watts v. Porter* by Mr. Justice *Erle*, which is in accordance with that I have adopted, to the decision of the other learned judges, by whom that cause was determined in a contrary manner. Lord Justice *Turner* goes somewhat further, resting his decision upon an opinion directly contrary to that which was adopted in *Watts v. Porter*. He says in effect, that, in principle, the two cases could not be distinguished (that there *was* a distinction is clear, because, in *Watts v. Porter*, as here, the charge was upon personalty, whereas in *Beavan v. The Earl of Oxford* it was on real estate), and he concurs with Lord *Cranworth* in giving a decided preference to the opinion of Mr. Justice *Erle* over that of the other judges.

My judgment coincides with that of Mr. Justice *Erle*; and fortified as I am by the opinions of Lord *Cranworth*, C., and Lord Justice *Turner*, I must hold, that, as against the mortgagee in this case, no lien was acquired by the charg-

(a) 5 D. M. G. 524, 525, 532.

(b) 3 Ell. & Bl. 743.

ing order, that order having been made after the execution of the mortgage.

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Judgment.

That disposes of the first question; and the first question being decided in favour of the Petitioner, the second, as I have already observed, does not arise.

But even if I had found it necessary to decide the first question otherwise than I have done, upon the second, the Petitioner must have succeeded. For here the order obtained by the judgment creditor is a simple order nisi; and from the 15th section of the Act it is clear, that the object of the order nisi is, "to *prevent* any person against whom judgment shall have been obtained from disposing of any stock . . . by the Act authorised to be charged." But, here, the stock was disposed of before the order nisi was made; and even if, by the order nisi, an inchoate right had been obtained, it would have been a sufficient cause to show against making the order absolute, that, before the order nisi, the debtor had assigned his interest in the stock.

Taking it either way, therefore, I must have decided in favour of the Petitioner, but I think it right to decide it upon the first ground.

The order will be in accordance with the prayer of the petition.

1858.

June 23rd,
25th, & 29th.

*Mining Lease—
Covenant not to
drown Mine—
Construction—
Removal of
Engine and
Plant—Injunction to restrain.*

The lessee of a mine covenanted by his lease, at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things, and materials which should have been used in and about the working of the mine, upon receiving twelve months notice from the lessor, and being paid for the same according to a valuation. In a subsequent part of the lease it was provided, that

it should be lawful for the lessee at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things, and materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice thereinbefore mentioned and upon paying the price estimated. The deed also contained a covenant by the lessee not to do any act which might occasion or tend to produce the drowning of the mine.

Fourteen years before the expiration of the term the lessee became insolvent, and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same unless he should be minded to purchase.

To a bill by the lessor, averring that such removal would occasion or tend to produce the drowning of the mine, and praying for an injunction to restrain the same until the end of the term, and until the Plaintiff had the opportunity of exercising his option to purchase, a demurrer was allowed, the Court being of opinion, that, according to the true construction of the lease, the lessee was to be at liberty to remove all the property in question unless the lessor gave notice of his intention to purchase, and paid for the same.

ROLLESTON v. NEW.

BY an indenture, dated April, 1852, the Plaintiff demised to the Defendant *Morley* certain mines, veins, and beds of coal, for a term of twenty-one years, at a fixed yearly rent per acre, for all coal got out or taken by the Defendant; and it was agreed, that, if the whole of the coal thereby demised should, before the end or other sooner determination of the term, be worked out and paid for, and the covenants, clauses, and agreements on the lessee's part should have been duly kept and performed, then the indenture should be void. The indenture contained the usual covenants for properly working the mine, and for the introduction of buildings, machinery, plant, and other materials, and a covenant that the plant, and all erections, machinery, and other works, implements, and things, to be made and used in or about the premises, should be of good workmanship and materials, and of a modern character. It contained also a covenant by the Defendant *Morley*, that he would not, during the term, wilfully or negligently do, or suffer to be done, any act or thing, which might occasion or tend to produce the drowning of the mine, or any loss of the coal in the beds thereby demised. And it then contained

a covenant, "that the lessee, his executors, administrators, and assigns, should, at the end or other sooner determination of the term thereby granted, if the lessor should require them so to do, leave for or deliver, and permit and suffer him to receive, take, and enjoy, for his own proper use, all and every the engines and engine, and other implements, plant, buildings, machinery, gearing, articles, things, and materials, which should have been erected, put up, or used in and about the working of the said colliery and coal mines, upon receiving twelve calendar months notice in writing from the lessor, and being paid for the same according to a valuation to be made by two indifferent persons, one to be chosen by the lessor, and the other by the lessee, his executors, administrators, or assigns, or by their umpire in case of disagreement." The indenture contained a proviso for re-entry by the lessor in the event of the lessee becoming insolvent; and it also contained a proviso and declaration, "that it should be lawful for the lessee, his executors, administrators, and assigns, at any time or times during the said term, or within the space of twelve calendar months next after the expiration or other sooner determination of the said term, to take down, carry away, and remove all and every the buildings, machinery, steam-engines, articles, things, and materials, which had been theretofore erected, or which should or might, at any time or times during the said term, be erected or brought by the lessee, his executors, administrators, or assigns, upon the said lands or grounds, unless the lessor should be minded or desirous to purchase the same, which he should have liberty to do, upon giving the notice thereinbefore mentioned, and upon paying such price or value for the same as should be estimated to be fair and reasonable by two indifferent persons to be appointed as therein mentioned, or by their umpire in case of disagreement."

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In November, 1857, the Defendant *Morley* assigned all his personal estate and effects (except the lease of the mines), to the Defendants *New* and *Handyside*, upon trust for the benefit of his creditors.

In April, 1858, the trustees sent to the Plaintiff a notice, that they intended to remove all and every the buildings, machinery, steam-engines, articles, things, and materials, erected or used in the mines by the Defendant *Morley*, unless the Plaintiff should be minded and desirous to purchase the same, at such price or value as should be estimated to be fair and reasonable, as mentioned in the indenture of lease, and of such his mind and desire should forthwith give them notice in writing.

The Plaintiff thereupon filed his bill, stating these facts, and charging that the removal of the said plant, buildings, and machinery, would cause great and irremediable injury and mischief to the mines, and would occasion or tend to produce the drowning of the mines, contrary to the covenants in the lease contained; and that, in order to prevent the mines from being drowned, it was requisite that the water should be pumped out by means of the said machinery, as had hitherto been done.

The bill prayed for a declaration, that, according to the true construction of the indenture of lease, the Defendants were not at liberty to sell or dispose of, or to remove, the said plant, buildings, machinery, gearing, articles, things, and materials from the mines, until the end or other sooner determination of the said term, nor until the Plaintiff should have had the opportunity of exercising the option, by the indenture reserved to him, whether or not to purchase the said plant and machinery, or any part thereof, according to the provisions of the indenture;

and praying also for an injunction on that footing, and for a receiver.

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Statement.

The Defendants demurred for want of equity.

Mr. James, Q. C., and Mr. Giffard, in support of the demurrer, contended :—

Argument.

First, that, according to the true construction of the lease, the lessee was to be at liberty, at any time during the term, to remove everything he had brought upon the premises, unless the lessor should give notice of his intention to purchase, and should pay for the same, which the Plaintiff had not done. The deed contained a proviso in so many terms to this effect; and with that proviso the preceding covenant, by which the lessee was bound to leave all the property in question upon the premises if the lessor required him, was not in conflict.

Secondly, that, even if the covenant were to be construed strictly, and without reference to the proviso which followed, the demurrer must be allowed, for such a covenant would be so injurious and oppressive to the lessee, that the Court would never enforce it, and ought not to grant an injunction to prevent it from being broken: *Talbot v. Ford*(a); otherwise, throughout the entire term of twenty-one years, the lessee would not be able to remove a single tool he had once brought upon the premises.

The VICE-CHANCELLOR.—The bill avers that there was an express covenant not to do any act which may tend to drown the mine.

Mr. Giffard.—If the removal of the steam-engines will

(a) 13 Sim. 173

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—
Argument.

have that effect, the Plaintiff has the remedy in his own hands, for he can give notice to buy them. Besides, if he compels the lessee to leave the engines, he cannot compel him to work them. The applications to the Court consequent upon such an injunction would be endless: *South Wales Railway Company v. Wythes* (a).

Mr. Willcock, Q. C., and Mr. De Gea, in support of the bill :—

According to the true construction of the deed, all the property in question must be left in the mine, until the end or other sooner determination of the lease, and will then be subject to the Plaintiff's right to elect, as in the lease provided, whether he will purchase upon the terms expressed in the lease. Till then no notice need be given by the lessor. As to this, the first covenant is absolute; and the subsequent clause, empowering the lessee to remove, must be read so as not to derogate from the rights of the lessor under the former. A contrary construction of the latter clause would result in extreme hardship to the lessor, by enabling the lessee to remove everything at any time within the term, or within twelve months after its expiration, and to do so every year, if so disposed. On the other hand, no hardship is imposed on the lessee by the construction for which the Plaintiff contends. The lessee is not bound to retain, to the end of the lease, the identical engines and machinery, but may remove them, provided he replaces them by others equally good, or leaves on the premises such plant or materials as may be wanted for the due and proper working of the mine.

Effect must be given to every clause in the deed. The deed contains a covenant by the lessee not to do any act which may occasion or tend to produce the drowning of the

(a) 1 K. & J. 186.

mine. The removal of the steam-engine will have that effect; and if so, the Court ought not to put such a construction upon the clause empowering the lessee to remove, as will render the covenant against drowning the mine inoperative, by enabling the lessee to do that which he has expressly stipulated not to do. The Court can restrain the breach of such a covenant in a deed, although it cannot enforce performance of the entire instrument: *Rolfe v. Rolfe(a)*.

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 —
Argument.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This demurrer must be allowed. The case is fully stated in the bill, and the question between the parties is fairly raised by the demurrer.

Judgment.
 —

The question is, what construction is to be put upon a lease containing certain covenants, of perhaps an unusual description, and appearing, at first sight, to be somewhat at variance with each other. To determine this question, in the present case as in every other, whether the instrument be a deed or a will, it is necessary to look at the whole instrument, and, giving due weight to each of the clauses which may appear to be in conflict, to consider what, upon the whole of the instrument, can be fairly collected to have been the intention of the parties.

The lease in question is a lease for twenty-one years, of which fourteen are unexpired. It contains the usual covenants for properly working the mine, for the introduction of machinery, plant, and other materials. It also contains a covenant not to do any act which may occasion or tend to

(a) 15 Sim. 88.

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 Judgment.

produce the drowning of the mine; and then there is the following covenant with reference to the machinery:—

[The Vice-Chancellor read the covenant by the lessee to leave the machinery and materials in question upon receiving twelve months notice, and being paid as above mentioned (a).]

That is certainly a covenant of a very large and somewhat burthensome description; and it is natural to expect to find some other clause in the lease to protect the lessee from its full effects. For the lessor is not bound to give notice until twelve calendar months before the expiration of the term (even if he is bound to do so then, having regard to a subsequent clause in the lease); and provided such notice should eventually be given, the effect of the first covenant is, that every single article which the lessee has introduced into the mine he is bound to keep there. He cannot remove a single engine for the purpose of substituting a new one in its place. There is a covenant in another part of the deed, that all the machinery and things to be used shall be "of a modern character;" but no single article or thing once brought upon the premises can be removed, if that covenant is to be taken alone. A covenant of so comprehensive a character might expose the lessee to considerable inconvenience.

It was argued, that this was not the case; that the covenant resembled, in effect, a covenant to keep up so many flocks of sheep, consistently with which individual sheep might be sold, provided the flock were kept up and ultimately made good; and that so here, the lessee was not bound to retain to the end of the lease the identical engines and machinery, but might remove them, provided he replaced them by others equally good; or provided he left on the premises such machinery and plant as might be wanted

(a) *Supra*, p. 641.

for the due and proper working of the mine. Such a covenant would have been a much more reasonable one to insert, but it is not the covenant with which I have to deal: that covenant is to leave *everything*, and the identical things, originally introduced.

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—
Judgment.

It being, therefore, natural to expect some other clause in the lease to protect the lessee from the injurious consequences of such a covenant, I find the following:—

[His Honour read the proviso and declaration set out above(a).]

It was argued, that the large power there given to the lessee to remove, at any time within the term or within twelve months after its expiration, all the things there specified, would be a hardship on the lessor; but that power (and this is the whole point of the case) is not absolute but conditional. The lessee is only to have a power of removal in the event of the lessor not being minded to purchase, which he is to be at liberty to do upon giving notice and paying the price estimated.

Thus read, the two clauses are not inconsistent. Nothing is specified as to the particular period when notice is to be given; but if the lessor is once minded, and once gives notice to purchase everything the lessee has brought upon the premises, everything so brought must be left for him by the lessee, the lessor paying for them, for that of course is implied. On the other hand, and to guard against a capricious use of that option in the lessor, if the lessee is minded to remove everything he has brought upon the premises he may do so, unless such notice be given and payment made.

The necessity for some guard of this description is obvious. For instance, by the terms of the lease, if all the


(a) *Supra*, p. 641, ad fin.

1858.
ROLLESTON
v.
NEW.
Judgment.

coal should be worked out before the end of the term, and the covenants, clauses, and agreements in the lease should have been duly kept and performed, then the lease was to be void. But suppose the coal to be worked out before the end of the year, and the covenants not to have been kept, then the deed would continue in force. The coal might all be worked out several years before the expiration of the lease, and yet, according to the Plaintiff's contention, every article ever brought upon the premises by the lessee would have to remain there, useless and rotting, until the term expired.

Again, to take the case that has happened,—and a better illustration, perhaps, cannot be put:—The lessee becomes insolvent, and has no means of working the mine. The lessor has provided for that event by reserving to himself the power of determining the lease. The lessor, therefore, is perfectly protected, for at this moment he may determine the lease and purchase all or any part of the property in question. But the lessee has no reciprocal power, he cannot shake off his lease; and the Plaintiff's contention is, that, notwithstanding the lessee is insolvent, and can no longer work the mine, he, the Plaintiff, is entitled to continue the lease, and to have it declared that for fourteen years all the property shall stand idle upon the premises for the benefit of no person whatever. To arrive at that construction, it would be necessary to override the express provision in the lease, that it shall be lawful, at any time, for the lessee to remove the property, unless the lessor shall give notice to purchase.

It was argued, that effect must be given to every clause in the deed, that the deed contains a covenant that the lessee shall do no act which may occasion or tend to produce the drowning of the mine; that the bill avers (what may be easily conceived) that the removal of the steam-engine will have that effect, and if so the Court ought not to put such



a construction upon the clause empowering the lessee to remove certain articles, as will render the covenant against drowning the mine entirely inoperative, by enabling the lessee to do that which he has expressly stipulated not to do. That argument might be cogent if the lessor had no option of giving notice of his desire that the property should be left. But the lessor has expressly reserved to himself that option. It was right that the Defendants should give notice of their intention to remove the property, in order that the landlord, if he pleased, might be able, by a counter notice, to stop their proceedings. But the correspondence shows that this course has been taken by the Defendants; and that being so, and no counter-notice having been given by the Plaintiff of his election to purchase, the lessee was at liberty to remove the property. As regards the drowning of the mine, therefore, the landlord must be left to his remedy (if he has one) at law by an action on the covenant. He has the power of stopping all the mischief which his bill seeks to prevent. He refuses to exercise that power. And it seems to me, that it would be an unreasonable interpretation of the lease to hold that, in order to prevent the possible consequences of that refusal on his part, the property must be left as it is for the next fourteen years, notwithstanding the express stipulation that it shall be lawful for the lessee "at any time or times" to remove it. Those words are too strong to be cut down in order to give effect to such an interpretation.

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ROLLESTON
v.
NEW
Judgment.

The intention of the parties to the instrument, as I have gathered it, might have been expressed in a manner less circuitous and cumbrous; nevertheless, it appears to me that it is sufficiently expressed, and that the construction I have adopted gives a rational meaning to the whole of the instrument. The demurrer, therefore, must be allowed.

Ordered accordingly.

VOL. IV.

U U

1858.

June 1st.

FARINA *v.* SILVERLOCK.

Trade Mark—
Printer—
Injunction—
Costs.

THE Plaintiff claimed a right to the exclusive use of certain labels, for the purpose of distinguishing bottles containing Eau-de-Cologne manufactured by him.

Perpetual injunction to restrain a printer from printing or selling labels similar to those used by Plaintiff as his trade mark, notwithstanding the possibility that some labels so printed and sold might be purchased bona fide and for the purpose of being applied to articles of Plaintiff's own manufacture from which his labels had been lost.

Defendant, insisting on an adverse right, after being made aware that the Plaintiff had been defrauded through his agency, ordered to pay the costs of all the proceedings, both at law and in equity.

Observations of Lord Cranworth, C., in *Farina v.*

Silverlock (6 D. M. G. 214) explained.

He averred by his bill that the Defendant had printed labels, which were an exact copy or fac simile of, or merely colourably different from his own, and had, for some time past, been in the habit of selling large numbers of such labels to parties who had purchased the same for the purpose of pasting, and who had pasted them, on bottles containing perfumed water, not manufactured by the Plaintiff or according to his invention; and that, by such means, a very large number of such bottles had been sold, and a large number were then in the market for sale, as containing the genuine Eau-de-Cologne manufactured by the Plaintiff, when, in fact, they contained only a spurious Eau-de-Cologne of a very inferior quality. The bill contained an averment, that the Defendant threatened and intended, unless prevented by injunction, to continue to print and sell such labels, and was then offering a large number for sale; and it prayed that the Defendant might be restrained from printing or selling any labels similar to those so in use by the Plaintiff, and that the stock of labels he had then on hand might be ordered to be delivered up.

In June, 1855, upon an interlocutory motion, the Vice-Chancellor granted an injunction as prayed. The proceedings upon this occasion are reported in a former volume of this series(a).

(a) Vol. 1, p. 509.

In February, 1856, the cause came on to be heard before the Vice-Chancellor, when a decree was made for a perpetual injunction, in the same terms as the former, and for delivery up of the Defendant's stock of labels.

1858.
 FARINA
 v.
 SILVERLOCK.
 ———
Statement.

From this decree the Defendant appealed. The appeal was heard before Lord *Cranworth*, C., who, on the 9th of July, 1856, dissolved the injunction, and ordered the bill to be retained for twelve months, with liberty for the Plaintiff to bring any action which he might be advised. The proceedings on the appeal have also been reported (*a*).

The Plaintiff accordingly brought an action, for the purpose of trying the question, whether the labels printed and sold by the Defendant were so printed and sold with a fraudulent knowledge, and were used to the injury of the Plaintiff. The action was tried in December, 1857, before Lord *Campbell*, C. J., who left it to the jury to say, whether the labels were the Plaintiff's trade mark, and if so whether the Defendant had sold any such labels knowing them to be so, and knowing that they were to be applied to bottles containing spurious Eau-de-Cologne. The jury found a verdict for the Plaintiff, with nominal damages.

The Defendant afterwards obtained a rule nisi for a new trial, upon the ground of mis-direction, and on the ground that the verdict was against evidence. But after argument before the full Court the rule was discharged, the Court observing, that if there had been a great question of right to be tried, a new trial might have been granted, but the question of right not being in issue, there should be no new trial merely for costs.

In the meantime the bill had been retained by various

(*a*) 6 D. M. G. 214.

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orders, and the cause now came on for further consideration before the Vice-Chancellor.

It appeared by the evidence of one of the witnesses, a Mr. *Orridge*, that upon one occasion he bought from the Defendant a hundred of his labels, for the purpose of pasting them upon bottles containing Eau-de-Cologne of the Plaintiff's manufacture, from which the Plaintiff's labels had been lost.

Argument.

Mr. *Daniel*, Q. C., and Mr. *Hetherington*, for the Plaintiff, asked for an order in the terms of the decree pronounced by the Vice-Chancellor in February, 1856; and that the Defendant might pay all the costs, including the costs of the appeal.

The VICE-CHANCELLOR.—I cannot give the Plaintiff the costs of the appeal.

Mr. *Willcock*, Q. C., and Mr. *Buxton*, for the Defendant, contended, that the question was not concluded by the verdict of the jury, and suggested that there ought to be a new trial. It was clear, from the observations of the judges of the Court of Queen's Bench, that in their opinion the Plaintiff had not made out his right to an exclusive user; and had the Defendant thought it worth while, on that occasion, to dispute the Plaintiff's right, the rule would have been made absolute.

At all events, the injunction should not be granted in the absolute form in which it was now asked; and if granted at all, the Defendant should not bear the costs of the proceedings.

[They repeated their former arguments as to the absence of proof of fraud on the part of the Defendant.]

The VICE-CHANCELLOR SIR W. PAGE WOOD (without hearing a reply)—I concur with Lord *Campbell*, that it is high time an end should be put to this litigation, and any notion of a new trial is out of the question.

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Judgment.

The Defendant's present contention is, that the question has not been conclusively established by the proceedings at law; that the question of right, although of the utmost importance to the Plaintiff, was of no importance to himself, and was, therefore, not put in issue by him on the rule being argued; otherwise, he says, the judges would have granted him a new trial notwithstanding the verdict of the jury. But the Plaintiff has been defrauded and injured by persons using the Defendant's labels, and has been defrauded through the agency of the Defendant in printing and selling them, and if the Defendant found it was of no importance to him to claim the right of printing and selling those labels, it was his duty, as soon as he became aware that the Plaintiff was injured by his doing so, to express his regret, to disclaim having injured him knowingly, and to undertake at once to desist from the course he had pursued. Had he taken this course, there would have been an end of the case when it first came before me, and he might then have had his costs. Instead of this, he insists upon that right, which he now admits to have been of no value to him; on my holding that he was not entitled to insist upon it, he appeals from my decision; on Lord *Cranworth* dissolving the injunction, he drives the Plaintiff to an action at law; and now, having failed at law to establish a right, which he admits it to be utterly useless for himself to establish, and of the utmost importance to the Plaintiff to controvert, he contends that he is not the party who ought to suffer from the consequences of all this useless litigation. Upon his own statement, it appears to me to be the strongest case for costs that I ever met with.

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As regards the question of fraud, it was pressed upon me very powerfully at the original hearing, as it has been again, that the pleadings were defective; and I felt some difficulty in this respect upon the former occasion. The allegation was, that the Defendant was doing acts which enabled others to defraud the Plaintiff; but the allegation was weak as to the scienter on the part of the Defendant. The bill did not go on to aver that the Defendant was doing those acts knowingly. However, I found in the bill a charge, that the Defendant threatened and intended to go on doing the acts complained of; and after that, it appeared to me, that it involved the scienter on his part; the Defendant persisting in doing that which, as he then knew, would enable others to defraud the Plaintiff, when he ought to have disavowed any such intention, it seemed to me to be a case for an injunction.

Lord *Cranworth* thought the cause was not ripe for decision in this Court until an action had been tried; an action has accordingly been tried, a verdict has been found for the Plaintiff, the Court of Queen's Bench has held, that, as the right was not in question, a new trial ought not to be granted, and that the course of conduct which the Defendant insists he has a right to pursue would be a fraud, whether with or without the scienter on his part; and as I find him still persisting in the assertion of his right to pursue that course, notwithstanding he is aware of the consequences of his conduct, I think it is high time for this Court to interfere by injunction, to prevent him from so doing.

The only question is as to the form of the injunction. It might be suggested, that the Defendant has a right to print labels to sell to persons, who, like Mr. *Orridge*, have lost the Plaintiff's labels from bottles containing his genuine Eau-de-Cologne; and that an injunction in the form now

asked would prevent him from doing so. The Lord Chancellor seems to have thought, that, if there were persons so situated, the Defendant's labels might be lawfully sold to them for that purpose. He says, "If there were dispersed over the country 100, or 500, or 1000 persons for whom these labels might be legitimately made, I cannot think it reasonable to say, that the Defendant's stock shall be destroyed and his trade stopped because he may sell to some person to whom he has no right to sell, there being a large number of persons to whom he may legitimately sell." And in an earlier passage he says, "It seems to me to be clear, that any man who had got the Eau-de-Cologne of the Plaintiff, but had not got a label, might employ any printer he thought fit to print or engrave for him a label which should be an exact counterpart of that which was used by the Plaintiff, for there is no copyright in it. All that the law restrains a person from doing, is selling the article which is not the manufacture of the Plaintiff with the Plaintiff's label upon it; but if it be the article which has been manufactured by the Plaintiff, it can be no ground of complaint by the Plaintiff that the person sells it with something upon it to represent his trade mark, though it is not a genuine trade mark." The question is, whether, looking to these passages in the Lord Chancellor's judgment, I should not add to the injunction I propose to grant, a direction "that the Defendant shall be at liberty to make any application he may be advised in respect of labels required to be placed upon bottles containing Eau-de-Cologne of the Plaintiff's manufacture." I should only do so out of deference to the observations of the Lord Chancellor.

Mr. *Daniel*, Q. C., submitted that such a direction would be considered as casting a doubt on the law. The Lord Chancellor's observations were only intended as explanatory of the reasons which led him to the conclusion that the question ought to be tried, whether, in this par-

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ticular case, there might not be a legitimate user; they could not have been intended to lay it down as a proposition of law that any person may imitate a trade mark.

The VICE-CHANCELLOR.—Perhaps it will be better to let the injunction go in its original form and without any such direction as I proposed to add. I should only have added such direction out of deference to the higher authority of the Lord Chancellor. But, upon consideration, I think that, in the observations I cited of Lord *Cranworth*, the Court was not pronouncing a judgment on what was to be done under circumstances like the present, but was giving a reason for directing the question to stand over until after the trial.

*Minute of
 Order.*

ORDER in same terms as decree of February, 1856. Defendant to pay all the costs of the action at law, and the costs of this suit, exclusive of Plaintiff's costs of the appeal.

January 22nd
 & 26th (a).
 Contract—
 Author and
 Publisher—
 Partnership—
 "Edition"—
 Stereotype—
 "Thousands"
 —Copyright.

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BY a memorandum of agreement, made in November, 1852, between the Plaintiff of the one part, and the Defendant of the other part, it was agreed, that the Defendant should publish, at his own expense and risk, a work intitled "Peg Woffington," of which the Plaintiff was the author; and

Agreement between the author of a work and a publisher, by which the publisher agreed to publish the work at his own expense and risk, and after deducting all charges and expenses, and a per-centage on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed of the work were to be equally divided between the author and publisher—*Held*, to create a joint adventure between the parties, which the author was at liberty to terminate upon notice to his publisher after the publication of a given edition, it appearing that, at the date of such notice, no fresh expense had been incurred by the publisher in printing, advertisements, or otherwise, since the publication of that edition.

Held, also, that the circumstance of the publisher having stereotyped the work previously to the publication of the last published edition, did not affect the right of the author to terminate the agreement as above.

On the meaning of the word "edition," as applied to cases where a work is stereotyped and printed in "thousands."

(a) Report delayed for want of papers.

after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments (if any), and other incidental expenses, including the allowance of ten per centum on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed of the work were to be divided into two equal parts, one moiety to be paid to the Plaintiff, and the other moiety to belong to the Defendant(a).

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In June, 1853, the same parties entered into a similar agreement relative to the publication of another work, intitled "Christie Johnstone," of which the Plaintiff was also the author; and they signed for that purpose a memorandum of agreement, which, except as to the date and the title of the work, was in the same words as the former.

On the 20th of February, 1857, the Plaintiff, finding that the Defendant had advertised the publication of a second edition of "Peg Woffington," filed his bill for an injunction to restrain the publication of the advertised edition of that work, and obtained an interim injunction, which, on the 5th of March, 1857, he moved to continue. But, inasmuch as it appeared that the interim injunction had been obtained against the Defendant after he had incurred the expense of putting the new edition in type, and issuing advertisements, the Vice-Chancellor held, that the Plaintiff was not in a position, so far as regarded that edition, to ask the Court to interfere. Accordingly, the interim order was discharged with costs(b), and eventually the Plaintiff had his bill dismissed.

(a) The remainder of the agreement, which the Court treated as immaterial for the purpose of the present question, will be found in the report of the former suit be-

tween the same parties, 3 K. & J. 271.

(b) See the report of these proceedings, 3 K. & J. 278-280.

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 —
Statement.

On the 5th of October, 1857, the Defendant having then published two editions of "Peg Woffington," and four of "Christie Johnstone," and intending to publish new and cheaper editions of both works, notice was given him on the part of the Plaintiff, forbidding him to publish a new edition of either work, and insisting that all his control over their publication had ceased.

The Plaintiff then filed a fresh bill, praying that the joint adventure or partnership between himself and the Defendant, under the agreements, might be dissolved, and for accounts and payment; that the Plaintiff might be declared to be the absolute owner or proprietor of the copyrights; that the agreements might be delivered up to be cancelled, and that the Defendant might be restrained from printing or publishing any reprint or new edition of either work, without the Plaintiff's written sanction.

It appeared that the Defendant had stereotyped one of the works; but that up to the 5th of October, 1857, the date of the Plaintiff's notice, no new expense had been incurred by the Defendant, either in printing, advertisements, or otherwise, as regards "Peg Woffington" since the publication of the second edition, or as regards "Christie Johnstone" since the publication of the fourth edition.

Argument.
 —

Mr. *Reade* (the Plaintiff), who argued his cause in person, contended that he was at liberty to terminate both agreements as from the 5th of October, 1857—the date of his notice.

The effect of the agreements was neither to assign his copyright: *Stevens v. Benning* (a), *Reade v. Bentley* (b), nor

(a) 1 K. & J. 168; *S. C.*, affirmed on appeal, 6 D. M. G. 223.

(b) 3 K. & J. 271.

to create a partnership. It resulted in a simple agency, which the author could then determine at pleasure.

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Mr. *James*, Q. C., and Mr. *Whitbread*, for the Defendant, did not contend that either agreement amounted to a sale of the copyright; but insisted, that, in each case, the Plaintiff had granted to the Defendant an irrevocable license to print and publish.

The VICE-CHANCELLOR.—Is it not rather a joint adventure?

Mr. *James*.—If so, it is one which could only be determined by mutual consent. In any case, the Defendant has obtained for valuable consideration a license, without limitation as to time or as to the number of copies, to print and publish the works in question; that license the Plaintiff could not revoke. The agreement reserves no power of revocation; and if such a power is to be implied, when was it to commence? If after the publication of the second or fourth edition, why not after the publication of the first? And if then, the publisher may lose all his outlay.

The VICE-CHANCELLOR.—Clearly he has no right to interfere with respect to any particular edition as to which you may have incurred expense before he took steps to determine the agreement. But has he not that right as to all other editions?

Mr. *James*.—But what is the meaning of the term “edition?” When a work is once stereotyped the publication is in “thousands,” and the technical term edition is no longer applicable. If the Plaintiff cannot show from the agreement the precise time at which his right to determine it is to commence, it can only be determined by mutual consent.

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 —
Argument.

The VICE-CHANCELLOR.—The agreement does not bind the Defendant to publish more than one edition; but, if your construction is correct, it does bind the Plaintiff. According to the doctrine in *Sweet v. Cater* (a) it binds the Plaintiff to abstain from publishing through any other channel until you abandon the contract. That does not seem an equitable position.

Mr. *James*.—I do not deny that there are equitable incidents, but those the Court will adjust.

Mr. *Reade*, in reply, contended, that an irrevocable license to print was, in effect, a grant of the copyright. Besides, the author would be ruined. The Court had held, upon the former occasion (b), that the Defendant was the person to fix the price; and if so, he might so adjust it, by cheap prices, as to preserve his commission of ten per cent. intact, but to leave nothing for the author.

[Further arguments on both sides are noticed in the judgment.]

Judgment reserved.

Jan. 26th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The Plaintiff is the author of two works, called "Peg Woffington" and "Christie Johnstone," for the publication of which he entered into certain agreements with the Defendant. Two editions of the former work and four of the latter having been published by the Defendant, and no fresh expenditure having been incurred by him since the publication of those editions, the Plaintiff claims a right to terminate the joint adventure between them, and to prevent the Defendant from publishing any further edition of either work.

(a) 11 Sim. 572.

(b) 3 K. & J. 271.

Many questions were discussed in argument, but the only question I have to determine is, what is the effect of the agreements which have been entered into between the Plaintiff and the Defendant with reference to the Plaintiff's works.

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The memoranda of agreement are, *mutatis mutandis*, in the same words. That set out in the bill relates to "Peg Woffington." It is very short; but, as I observed upon the occasion of the former suit, it is so worded as to make it very difficult to determine with certainty what was the intention of the parties at the time when it was concluded.

[His Honour read the argreement of November, 1852.]

Agreements between authors and publishers assume a variety of forms. Some are so clear and explicit that no doubt can arise upon them. Thus, where an author assigns his copyright, the transaction is one which every person understands, and which leaves no room for uncertainty as to the rights of the parties. Again, where, as in *Sweet v. Carter*(a), the author assigns a particular edition, the rights of himself and the publisher are equally clear; and—although in that case the point did not require determination—the Court observed, and justly observed, that, where an author has sold an edition of a given number of copies to one publisher, he is not at liberty, before they are sold, to publish the same work himself or through another publisher, in such a manner as to compete with the edition he has sold, but is bound to afford to the purchaser a full opportunity of realising the benefit of his contract.

The case now before me, like that of *Stevens v. Ben-*

(a) 11 Sim. 572.

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ning(a), is of an intermediate description. Here, as there, the author does not sell or purport to sell any interest whatever in the copyright. It was contended, and very strongly, in *Stevens v. Benning*, that the author had done so; but I held that he had not, and my view was affirmed by the Lords Justices. Here also, as there, the publisher was to publish at his own risk. Nevertheless, in *Stevens v. Benning*, the agreement contained other provisions, considerably more definite than any in this case. It pointed to a series of editions to be published for the author by the same publisher, as to every one of which the author himself stipulated, as part of the contract, that he would assist in the publication. Here the agreement is simply, that the publisher shall publish the work at his own expense and risk, and, after deducting all the expenses specified in the memorandum, and an allowance of 10% per cent., the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one of which is to be paid to the author and the other to the publisher.

It has been contended by the Plaintiff, that the case is one of simple agency; that, by the effect of the agreement, the Defendant became a mere agent of the Plaintiff. But it is clear that he became more than that. A mere agent may be paid, as the Defendant was to be paid, by a share of the profits; but a mere agent never embarks in the risk of the undertaking; and here the Defendant took upon himself the whole expense and risk of bringing out the work. Clearly, therefore, the case is something more than one of simple agency.

On the other hand, it was contended for the Defendant, that, if the effect of the agreement was not an assignment

(a) 1 K. & J. 168; S. C., 6 D. M. G. 223.

of the copyright (which it is now clearly decided that it could not be), it resulted in a joint adventure, in which the Defendant was to have a license to publish the work ; and that, from the nature of the case, and by the terms of the agreement, that license was irrevocable.

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In *Stevens v. Benning* I considered the agreement must be regarded as creating, to a certain extent, a joint adventure; and Lord Justice *Knight Bruce* adopted the same view. He says, it must be observed, that such interest, if any, in the copyright of the author's work as the other parties to the agreement acquired under it, they acquired, not exclusively of the author "but by way of joint adventure with him, or of partnership with him, in respect and for the objects of which he undertook the fulfilment by himself personally of certain duties to them, and they undertook the fulfilment by themselves personally of certain duties to him" (a).

Community of risk did not appear to me to be by our law, any more than it was by the civil law, essential to constitute a partnership; one partner being at liberty to contract with another that he will take all the losses of the concern upon himself.

Lord Justice *Turner* looked upon the agreement in *Stevens v. Benning* in the double light of a license and a partnership, speaking, however, less decidedly as to its being a partnership. He says, "Next, if there was a partnership, then, if the agreement does not affect the copyright, the partnership was not in the copyright, but in the copies printed under the license contained in the agreement" (b); —viewing it, therefore, as a license for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. If that were

(a) 6 D. M. G. 229.

(b) *Id.* 231.

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 ———
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the effect of the agreement in the present case, the question would still remain, whether the license be irrevocable.

In the former suit between these parties (*a*), the Plaintiff claimed a right to prevent the publication of an edition with respect to which the Defendant had been allowed to incur various expenses before the Plaintiff had taken any step to determine the joint adventure between them. In the present suit his claim is wholly different. He does not attempt to interfere with the publication of an edition which the Defendant had commenced, and incurred expense in preparing for publication, before he exercised the option of determining the agreement. His claim is limited to editions about which no such expense had been incurred by the Defendant; and his argument is, that, unless he has a right to determine the agreement as to all such editions, the consequence will be, that, during the whole of the Defendant's life, he may be under an obligation to the Defendant, while the Defendant will be under no reciprocal obligation to him. It is true, that, according to *Stevens v. Benning*, a license like the present would, I apprehend, be restricted to the Defendant personally, and would not extend to his executors, or to any future partner or assignee; but if the Defendant's construction be correct, it follows, that, so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in *Sweet v. Cuter*, the Plaintiff will be precluded from asserting a right to publish any competing edition. The Defendant could compel the Plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the Plaintiff has no reciprocal power. He could never compel the Defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and,

(*a*) *Reade v. Bentley*, 3 K. & J. 271.

according to the contract, when the Defendant has published a single edition the contract on his part is fulfilled. That is a position of considerable hardship for an author, and one which ought to be clearly shown, upon the face of a contract, to have been contemplated by the parties who entered into it.

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 —
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Besides, the Plaintiff might be placed in a position of still greater hardship, if the Defendant's construction be correct. In the former suit between the parties, in reference to this agreement, I held, that, although the agreement is silent on the subject, yet inasmuch as the Defendant was to bear the risk of the publication, he was the proper person to fix the price; and, by parity of reasoning, he would be the proper person to fix the time and mode of publication; and, in the exercise of his discretion on that subject, it might well happen that the Defendant, acting perfectly *bonâ fide* and upon an honest conviction that circumstances were unfavourable for the publication of a further edition, would decline indefinitely to publish, but without resigning his contract. The author, at the same time, might be of a contrary opinion, and yet for months or even years he might be kept in suspense, and prevented from publishing on his own account until his publisher should be of opinion that the time had come for the revival of the public interest in the work. That is a position of difficulty and hardship to which an author ought not to be reduced, unless the contract is express and clear upon the subject.

On the other hand, it was very ably urged by the Defendant's counsel, that, if the Plaintiff has the right of determining the agreement, he is bound to show from the contract at what precise time that right commences. If he can arrest the publication of a third, fourth, or fifth edition, the same argument, it was said, must apply to the second;

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—
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and if the Plaintiff cannot fix upon some particular time at which, according to the contract, his right is to commence, the inference must be, that the agreement is only determinable by a joint resolution of both parties. As regards a second edition this argument is particularly forcible, although possibly it might apply to others. The publisher may urge that he has given the benefit of his talents and position as a publisher; that he has invested his capital, sparing no expense, in bringing out the first edition, in the expectation of being recouped the cost of the first by the sale of the second and subsequent editions; that as to one of the works in question he has even gone so far as to have it stereotyped with that view; and that, to hold the author entitled at his own instance to determine an agreement like the present, when the first edition has been published, would be to enable him, by an arbitrary and unreasonable exercise of that power, to deprive the publisher of all his profits.

This consideration makes it necessary to inquire, whether, upon the face of the agreements, any definite time can be reasonably said to be pointed out for the determination of the joint adventures in question; or whether the terms of the agreements are such as necessarily to hold the Plaintiff bound for an indefinite series of editions, and thus to subject him to the disadvantages to which I have referred.

Now, on carefully reading through each agreement, it appears to me, that, at all events, certain definite times are distinctly pointed out for the adjustment of the accounts, and that those times are the successive periods when the various receipts and payments on account of the successive editions have been ascertained.

It was said, that the Court must first ascertain the meaning of the term "edition;" that, when a work has

once been stereotyped, the term "edition" is no longer applicable; that when a work is published in what are called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an "edition." Now I apprehend, that, not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an "edition" of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of moveable type or by stereotype, does not seem to me to be material. If moveable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, advertising afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term "edition," whether the new "thousand" have been printed by a re-setting of moveable type, or by stereotype, or whether they have been printed at the same time with the former thousand, or subsequently. A new "edition" is published whenever, having in his store-house a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade, is done, as is well known, periodically. And if, after printing 20,000 copies, a publisher should think it expedient, for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new "edition" in every sense of the word.

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The persons who framed this agreement appear to have understood the word in this sense. The agreement provides

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that, "after deducting from the produce of the sale the charges for printing, paper, advertising, embellishments (if any), and other incidental expenses, the profits remaining of every *edition* that shall be printed of the work" shall be divided as specified. It uses the word "edition" to designate that periodical issue, which is capable of being made the subject of a separate account of profit and loss.

Such then being the meaning of the word "edition," the agreement provides, that, so soon as all the charges and expenses, and all the receipts in respect of each edition, shall have been ascertained, the accounts shall be taken, and the profits divided. That is the period distinctly pointed out by the agreement for the adjustment of the accounts.

It is not necessary for me to hold, that, because these periods are pointed out for the adjustment of the accounts, the loss on one edition might not be set off against the profits on another. Nor is it necessary to hold that accounts might not be made out, as they are said to have been in fact made out, yearly. It might take some years to circulate any one edition, and during that period accounts would of course be properly made out in respect of copies already in circulation.

If then it is open to the Plaintiff to say that certain definite times are distinctly pointed out, upon the face of the agreement in question, for the adjustment of the accounts, it appears to me, upon the balance of the difficulties in the way of each construction, that the difficulty of deciding against the author's construction, and holding that he has parted to so great an extent with his copyright, preponderates. It cannot be contended, that the agreement on his part is like a grant, in which the onus is upon the grantor of showing that he has not parted

with all which the grant appears to comprise. The onus here is with the party who contends that this agreement amounts to a license, which, upon the face of it, it does not. It certainly is not an assignment of the copyright. It does not appear to me to create more than a joint adventure; and if license there be at all, it is only a license so far as may be necessary for carrying out that joint adventure, and an implied license for that purpose. That being so, the onus is upon the Defendant, of showing that the contrary construction is necessary; and that not being shown, a construction which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character.

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In the present case, no new expense has been incurred by the Defendant, either in printing, advertising, or otherwise, as regards "Peg Woffington," since the publication of the second edition, and, as regards "Christie Johnstone," since the publication of the fourth edition; and that being, as I have already intimated, the true test in construing the agreement, it appears to me, that, when those editions were published, the period had arrived, at which the parties intended a division of profits to take place, and at which the Plaintiff became entitled to terminate his agreement with the Defendant.

This is the only conclusion at which I can arrive, after a very careful consideration of the contracts. But it is much to be regretted that contracts should be framed with such uncertainty, when it would have been so easy to make them certain. Up to the hearing I shall certainly give no costs, because I think each party equally in fault, for having entered into agreements which it is so difficult to construe.

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Minute of
 Decree.

It will not be necessary to order an injunction—a declaration will be sufficient.

DECLARE, that the Plaintiff is at liberty to determine the agreement of November, 1852, with respect to the publication of "Peg Woffington," and the agreement of June, 1853, in respect of the publication of "Christie Johnstone," as from the 5th of October, 1857, the date of his notice; and that the Defendant is not entitled, under the said agreements respectively, to publish any further edition of the said works. Order accounts (if necessary); and declare that the Plaintiff is not to be at liberty in any way to interfere with the sale of the several copies of the said works respectively published by the Defendant prior to the 5th of October, 1857. Reserve further considerations. Liberty for both parties to apply. No costs up to the hearing.

March 24th.
 Practice—
 Redemption
 Suits—Dis-
 claimer—Costs.

In suits for redemption, to entitle a Defendant, who has never claimed an interest, to his costs, he is not bound to show that he has disclaimed, or given notice to that effect, before he was made a Defendant to the suit.

BELLAMY v. BRICKENDEN.

THE bill was filed in 1856, by the Plaintiff, as first incumbrancer of the real estate in question in the cause, against one *Brickenden*, since deceased, as first incumbrancer, and others, praying (inter alia) an account of what was due to *Brickenden*, and for liberty to redeem him.

Brickenden died in 1857, having devised all estates vested in him as trustee or mortgagee to *Lochner* and *Batten*.

On the 3rd of March, 1858, the suit was ordered to be revived against *Lochner* and *Batten*; upon which *Lochner* gave notice of motion that the order of the 3rd of March

A devisee of mortgage estates, in a suit for redemption, disclaimed after the suit had been revived against him, denying that he ever had or claimed any interest:—*Held*, that he was entitled to costs, notwithstanding persons who had acted as his solicitors in other matters, on being applied to by Plaintiffs before he was made a Defendant, to know whether he claimed an interest, had neglected to return any answer to such application.

The rules laid down in *Ford v. Lord Chesterfield* (16 Beav. 520), as to costs of disclaiming Defendants in suits for foreclosure or redemption approved.

might be altered or varied, by striking out his name as a necessary party to the suit, and by inserting a recital that he had disclaimed all trust estates vested in him under the devise; and in support of this notice of motion he filed an affidavit, denying that he had ever claimed or had any estate, &c., in the property in question.

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Statement.

It appeared by affidavits filed on behalf of the Plaintiff, that, on the 5th of November, 1857, his solicitors had applied to a firm who had acted as solicitors of the Defendant *Lochner* in other matters, to know whether he would represent that Defendant, and whether he would undertake to appear for him to the order of revivor; and that the said firm had repeatedly promised to send him an answer to this application, but had never done so.

Mr. *E. Webster* now moved on behalf of the Defendant *Lochner*, and asked for the costs of the motion, citing the rule as stated obiter by Sir *J. Romilly*, M. R., in *Ford v. The Earl of Chesterfield*(a), and *Higgins v. Frankis*(b).

Argument.

Mr. *Lambert* for the Plaintiff did not deny that the disclaimer was sufficient; but contended, that, under the circumstances, the Defendant *Lochner* was not entitled to his costs. Not only had he neglected to give the Plaintiff notice of his intention to disclaim, but, on the Plaintiff's solicitors going out of their way to apply to his solicitors, to know whether he claimed any interest, the latter had neglected to return any answer to the application.

VICE-CHANCELLOR SIR W. PAGE WOOD (without hearing a reply):—

Judgment.

In this case, the conduct of the Defendant's solicitors

(a) 16 Beav. 520.

(b) 20 Law J., N. S., Ch., 16.

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Judgment.

may be open to observation ; but I cannot upon that ground deprive the Defendant of the costs to which, independently of that consideration, he is clearly entitled.

The rule as to costs of disclaiming Defendants in suits for redemption or foreclosure is very clearly stated by the Master of the Rolls in *Ford v. The Earl of Chesterfield* ; and I am glad to find a reported decision which meets so fully and comprehensively all the questions likely to arise in such cases.

It is quite clear, as it is there laid down, that in suits for foreclosure or redemption of mortgages, where a Defendant, after the filing of the bill, or after he is made Defendant to the suit, disclaims in such a manner as to show that he never had and never claimed an interest, he is entitled to his costs. Even where, as in the second case put by the Master of the Rolls, the Defendant has an interest, but shows that, before he was made a Defendant to the suit, he disclaimed or offered to disclaim, he is entitled to his costs ; but where he shows that he never had and never claimed an interest, there he is under no obligation to disclaim or to offer to disclaim before he is made a Defendant. His disclaimer, although not put in until after he was made a Defendant (assuming that he has done no act inconsistent with it) relates back to the date at which the estate passed to him, and operates as a disclaimer of that estate *ab initio* ; and to entitle him to the costs of his disclaimer, he is not bound to show that he has disclaimed or given notice to that effect to the Plaintiff before he was made a Defendant. A man is not bound, as soon as he hears that an estate has been devised to him, to go about searching out every person who can institute a suit against him, and giving notice to all such persons that he claims no interest.

Here the only circumstance to be noticed is the conduct

of the Defendant's solicitors. I quite agree that the Plaintiff's solicitors were right in applying, in the first instance, to the persons whom they believed to be his solicitors, instead of applying to himself; but, after applying to them and not getting a reply, the obvious course was to apply to the Defendant himself. The conduct of the Defendant's solicitors may be open to remark, but that cannot deprive the Defendant of the costs to which he is otherwise entitled.

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Judgment.

IN RE EARL'S TRUST.

WILLIAM CRISPE, by his will, in 1828, devised his residuary real and personal estate and effects to his sons *Edward*, *Charles*, and *James*, and his daughter *Priscilla*; and he appointed his son *John Crispe* and *Edward Norrington* executors of his will.

By a codicil, in 1830, he revoked the devise in his will to his son *Edward*, and gave the property by his will devised to *Edward*, to his sons *John*, *Charles*, and *James*, and to his daughter *Priscilla*; and, after certain other directions, immaterial to the question now before the Court, he concluded this codicil as follows:—"In all other respects I do confirm my said will, and declare this to be a codicil thereto."

In 1833 the testator made a second codicil of that date, as follows:—"This is a second codicil to the last will and testament of me, the within-named *William Crispe*. I do revoke the appointment in my said will made of my son *John* as executor of my said will, and do, in his place and stead, appoint my son *Charles* as such executor, jointly with my other executor *Edward Norrington*."

July 30th.

Will—Codicil
appointing an
Executor—
Republication
—After-ac-
quired Lands.

A codicil ap-
pointing a new
executor—
Held, a repub-
lication of the
will, and to
give to the lat-
ter the effect
of passing after-
acquired lands.

The cases on
this subject re-
conciled.

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The question was, whether the second codicil amounted to a republication of the will, so as to give to the latter the effect of passing real estate acquired by the testator since the date of his first codicil.

Argument.

Mr. *G. W. Collins*, for the Petitioner, contended that the second codicil amounted to a republication of the will, so as to pass the after-acquired lands, citing *Hulme v. Heygate*(a), and *Hamilton v. Carroll*(b).

Mr. *Robinson*, for the Respondents, contended, that the after-acquired lands did not pass, citing 2 Comyn's Digest tit. "Devise," *The Countess of Strathmore v. Bowes*(c), *Monypenny v. Bristow*(d), and *Doe dem. York v. Walker*(e). *Strode v. Russell*(f) showed that a codicil which concerned only personal legacies, did not amount to a republication of the will, so as to give to the latter the effect of passing after-acquired lands.

Besides, in the first codicil the testator had expressly republished his will; in the second he had not.

[*Pigott v. Waller*(g), *Hughes v. Turner*(h), and *Ashley v. Waugh*(i), were also cited.]

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The cases on this subject divide themselves into two classes:—

(a) 1 Mer. 285.

(b) 1 Irish Equity Rep. 175.

(c) 7 T. R. 482.

(d) 2 Russ. & My. 117, 134.

(e) 12 Mee. & W. 591.

(f) 2 Vern. 625.

(g) 7 Ves. 118.

(h) 3 My. & K. 666.

(i) 4 Jur. 572.

The first class, of which *Acherley v. Vernon*(a) is an example, establish that a codicil duly executed shall have the effect of republishing the will, so as to pass after-acquired lands, unless an intention to the contrary appear by the codicil.

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The second class, of which *The Countess of Strathmore v. Bowes*(b) is an instance, establish that where an intention to the contrary does appear by the codicil,—for instance, where the codicil is in effect a devise of the identical lands which had been mentioned in the will, and of no more,—there lands acquired after the date of the will do not pass.

With these rules all the cases agree.

The only decision which looks somewhat stronger than the rest is that in *Monypenny v. Bristow*(c). There the codicil contained a recital of the testator's desire that his wife might enjoy "the whole of his lands" for her life, but the devise was only of certain lands already specified in the will. The testator recited his intention to give his wife a life estate in all his lands, but, in carrying out that intention, he restricted the gift to such of his lands as he had previously mentioned in his will. The judgment is, unfortunately, very short; but that must have been the reason of the decision. It clearly could never have been intended to overrule what had been established in *Acherley v. Vernon*.

This codicil is expressed to be a second codicil to the testator's will; and there being nothing in it to indicate a contrary intention, its effect is to enlarge the operation of the will, and to cause the will to pass lands acquired since the will was executed.

(a) Comyn's Rep. 381; S. C.,
3 Bro. P. C. 107.

(b) 7 T. R. 482.

(c) 2 Russ. & My. 117.

1858.

July 22nd &
23rd.THE EUROPEAN AND AUSTRALIAN ROYAL
MAIL COMPANY (LIMITED)

v.

THE ROYAL MAIL STEAM PACKET COMPANY.

*Merchant Ship-
ping Act, 1854
—17 & 18 Vict.
c. 104, s. 70—
Power of
Mortgages to
use Ship—
Registered
Owner—Equit-
able Interest in
a Ship.*

A mortgagee
of a ship has
power, under
the 70th sec-
tion of the
Merchant
Shipping Act,
1854, to use,
as well as sell,
the ship:—
Semble.

Where a
mortgagee
claimed under
a special con-
tract, which
did not con-
template a sale
by him until
two months
had elapsed
after a demand
for payment,—
Held, upon the
construction of
the agreement,
and especially
having regard to the circumstance that the ship would otherwise remain useless in that in-
terval, that he was at liberty to use the ship.

In such a case, the circumstance of the mortgagee being registered as absolute owner is not
conclusive as to the rights of the parties.

Further observations as to the power of the Court, under the Merchant Shipping Act, 1854,
to recognise equitable rights in a ship as distinguished from those of the registered owner.

PREVIOUSLY to July, 1857, the Plaintiffs adopted a contract for the *Australian* Mail Packet service, then lately entered into with the Government by another company; and for the purpose of carrying out that contract, they provided four steam vessels and made arrangements for providing an additional number, including a ship called *The Tasmanian*, for the building of which they entered into a contract with certain ship-builders at *Glasgow*.

In July, 1857, finding their vessels and capital insufficient for the fulfilment of their contract with the Government, the Plaintiffs opened a negotiation with the Defendants for an amalgamation of the Plaintiffs' and Defendants' companies; but as this object could not be effected without the authority of Parliament, it was determined to apply to Parliament for an Act for that and other purposes.

By an agreement, dated September, 1857, entered into between the Defendants and the Plaintiffs in anticipation of the amalgamation of the two companies, and with the view to their being in the meantime worked in terms of the amalgamation approved of by the said companies re-

spectively, it was agreed (inter alia) that the Defendants should undertake the fulfilment of the Plaintiffs' contracts with the Government; that the vessels required for the service should be furnished by the Plaintiffs to the extent of the then existing stock of vessels, which should continue to be used so far as required in and towards performing the service between *Suez, Australia, and India*; that the Defendants should provide the stores and all other matters required in the employment of the ships, and should receive all moneys payable for freight, passengers, or otherwise in connection with the service; that application should be made to Parliament for an Act to enable the two companies to amalgamate; and that, in the event of the failure of such application, the now stating arrangement should be in force for nine months.

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On the 24th of December, 1857, the Defendants having applied to the Plaintiffs for security for the amount expected to become due, in consequence of the agreement of September, in the event of the proposed amalgamation not being effected, the Plaintiffs executed an assignation of that date, whereby they assigned in favour of the Defendants all their right and interest in *The Tasmanian*, then still in building and incomplete, with full power for the Defendants to receive, and, if necessary, to sue for delivery of that steamer, and to receive, and, if necessary, to sue for delivery of the builders' certificate, and to register themselves as owners thereof, and generally to do everything in the premises which the Plaintiffs could have done at or before the granting of such assignation.

On the same day the Plaintiffs and Defendants executed a memorandum of agreement, of even date, whereby, after reciting the assignation, it was declared and agreed with reference thereto as follows:—1. The Plaintiffs bound themselves to complete *The Tasmanian* at their own ex-

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 —
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pense.—2. In case the Defendants should advance any sum or sums of money to complete and finish the said steamer, which, however, they should be in no ways bound to do, such advance or advances should form a preferable claim on the said steamer.—3. After payment of such advance or advances, if any, the Defendants agreed to hold the steamer on security of certain claims therein mentioned, which should rank *pari passu* (one of such claims being a demand of the Defendants).—4. In case the advances, if any, mentioned in Article 2, or the claims mentioned in Article 3 should, after the same should have become payable, remain unpaid for two months after a demand for payment should have been made in writing on the Plaintiffs, then the Defendants should be entitled to sell the said steamer, and to pay the said advances and claim out of the proceeds thereof.—5. The Defendants agreed, in the event of such sale, to pay or account to the Plaintiffs for the balance of the proceeds thereof; and that, in case of the said advances and claims being satisfied by the Plaintiffs before a sale of the steamer, the Defendants should, at the expense of the Plaintiffs, convey the steamer to them.

A bill for the amalgamation of the two companies was brought into Parliament in 1858, but was shortly afterwards abandoned. The Plaintiffs became embarrassed, and were now being voluntarily wound-up under the Joint Stock Companies Winding-up Act, 1856.

The Defendants took possession of *The Tasmanian* and brought her to *Southampton*, where they caused her to be registered in their own names as owners.

The bill charged that the Defendants intended to send the ship on their own service to *Australia*; that the Plaintiffs were desirous of redeeming her, or, in default, of having

her sold in this country ; and that, if sold elsewhere, a great loss would be sustained upon her sale, and if sent on a voyage her value would be greatly deteriorated.

The bill prayed an account of what was due to the Defendants under the assignation and memorandum of agreement of December, 1857 ; that the Plaintiffs might be declared entitled to redeem *The Tasmanian*, or that the ship might be sold under the direction of the Court ; that the Defendants might be restrained from sending the ship to sea, or otherwise employing her in their own service, and from removing her from the *Southampton Docks*, and that they might also be restrained from selling or transferring the ship to any person except under the direction of the Court.

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Mr. James, Q. C., and Mr. R. Pryor, for the Plaintiffs,
now moved for an injunction as prayed.

Argument.

They admitted that the Defendants were registered as absolute owners of the ship, but that circumstance was not conclusive as to the rights of the parties. It was a common practice in *Scotland*, and even in *England*, to register a mere mortgagee of a ship as absolute owner. Even under the old shipping Acts the register per se was no evidence of ownership ; but the Court was in the habit of looking to all the circumstances to ascertain whether it was the intention of the parties that the persons registered should become the absolute owners : *Myers v. Willis* (a) ; and a bill of sale, though absolute in its terms, might, notwithstanding the old Ship Registry Acts, be in equity held a mortgage merely, if such appeared to have been the real intention of the parties : *Langton v. Horton* (b). If such was the law

(a) 17 C. B. 77.

(b) 5 Beav. 9.

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under the old Shipping Acts, much more was it so under the recent Act, The Merchant Shipping Act, 1854(a).

In the present case the intention of the parties was, that the Defendants should be simply mortgagees of the ship. And upon the true construction of the assignation of September, and the memorandum of agreement of even date, which must be read as forming part of the same transaction, that was the position occupied by the Defendants.

The Defendants, then, being mere mortgagees of the ship, have no power to avail themselves of their possession of the ship, except by withholding it from the Plaintiffs, so as to compel them to redeem if they wish to recover possession, or by selling it when the time arrives, in order to repay themselves the amount of their advances. To use the ship in any way is beyond their power. The ship is a chattel. The Defendants are merely depositories of a chattel—pawnees of a pledge, and, as such, have no right to use it. In *Coggs v. Bernard* (b), *Holt*, C. J., in considering what property a pawnee has in the pawn or pledge, says:—"If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril . . . If she wears them abroad and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used." And to the same effect Sir *William Jones* (c)—"The pawnee of goods which will be impaired by usage cannot use them." Mr. Justice *Story* goes further:—"If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly inter-

(a) 17 & 18 Vict. c. 104.

(b) Lord Raym. 909, 916.

(c) "Essay on the Law of Bailments," p. 81.

dicted"(a). In fact, it is wholly inconsistent with the relation of creditor and debtor that the pawnee should be able to use the thing pawned in any way which may prevent him from restoring it again in the state in which it was deposited, whenever his debt is paid.

Mr. *Rolt*, Q. C. (with whom were Mr. *Goldsmith*, Q. C., and Mr. *Knox Wigram*, who were not heard) for the Defendants, contended that, even if the Defendants were simply mortgagees of the ship, it would be impossible to deny their right to use and sail her as proposed, citing *Kerswill v. Bishop*(b), and *Cato v. Irving*(c). But here all doubt on the subject was excluded by the agreements which had been entered into, for the Defendants' debt carried interest, of which they would be deprived if left to rely on their power of sale, since that power could not arise until two months after a demand for payment.

Mr. *James*, Q. C., in reply, distinguished between the rights of a mortgagee of a ship previously to the Act 6 Geo. 4, c. 110, and those subsequently to that Act. Under the old law a mortgage of a ship resembled a mortgage of real estate. But, by the Act 6 Geo. 4, c. 110, s. 45, the mortgagee is not to be deemed to be the owner of the ship any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship available, by sale or otherwise, for the payment of his debt. And the same provision is found in the 8 & 9 Vict. c. 89, s. 45.

The VICE-CHANCELLOR.—It was held in *Dean v. M'Ghie*(d) that the object of the Act 6 Geo. 4, c. 110 was to confer a benefit on mortgagees, not to deprive them of

(a) Story's "Commentaries on the Law of Bailments," sect. 330. (c) 5 De G. & Sm. 210.
(b) 2 Cr. & J. 529. (d) 4 Bing. 45.

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their rights as legal owners. And this is recognised by Lord *Tenterden*, in his Treatise on Shipping, citing *Dean v. M'Ghie*, as opposed to *Irving v. Richardson* (a), where it was doubted whether a mortgagee could insure to the full value of the ship (b). Besides, do not the words "by sale or otherwise" point to a user, as well as sale, of the ship?

Mr. *James*, Q.C.—If they do, the inference does not apply to the Merchant Shipping Act, 1854 (c), for in the 70th section of that Act (which corresponds to the 45th section in each of the former Acts) the words "by sale or otherwise" do not occur. The provision being merely that the mortgagee is not to be deemed owner "except in so far as may be necessary for making the ship available as a security for the mortgage debt." But, even under the earlier Acts, no notice is found, throughout Lord *Tenterden's* Treatise, of a mortgagee of a ship having a right to work the ship, or any other right, except by way of sale.

[*Parr v. Applebee* (d) was also cited.]

The VICE-CHANCELLOR reserved judgment, observing, it was remarkable that there did not appear to be any reported decision upon the question of law, which had been principally argued.

July 23rd.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The point to be determined in this case is, whether, under the circumstances detailed in the bill, the Plaintiffs are entitled to restrain the Defendants from making use of

(a) 2 B. & Ad. 196.

(c) 17 & 18 Vict. c. 104.

(b) Abbott on Shipping, pp. 41,
 42.

(d) 7 D. M. G. 585.

the ship *Tasmanian*, by sending her to sea, or otherwise employing her in their own service.

Two questions of some importance were raised in the course of the argument.

The first question was, whether, under the Merchant Shipping Act, 1854, the Defendants being registered as the actual owners of the ship, this Court can so far recognise an equity in the Plaintiffs—assuming the Plaintiffs to have the equity which they claim—as to prevent the Defendants from exercising their rights as registered owners.

As I have come to the conclusion, upon the construction of the agreements entered into between the parties, that the Plaintiffs are not entitled to the equity which they claim, it is not necessary for me to determine this question. But, I must observe, that, whenever such a question has to be decided, it will be found that there are very material points of distinction between the Merchant Shipping Act of 1854 and all the previous Acts relative to the subject of merchant shipping, and that the powers of this Court under the Act of 1854, are far greater than any it possessed in this respect before that Act was passed (a).

The second question was, whether, assuming the effect of the agreements between the parties to be that the Defendants are simply in the position of mortgagees of the ship, the ship being a chattel, they are not precluded from availing themselves of the possession of that chattel, except by withholding it from the Plaintiffs, so as to compel them to redeem it if they wish to recover possession, or by selling it for repayment of their mortgage money.

This question, also, in the view I take of the construction

(a) See sections 37, 43, 65, 76, 77, 81, 83, and 100; also 18 & 19 Vict. c. 91, s. 10.

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of the agreements between the parties, it is not necessary to determine.

Nevertheless, I cannot help having a very strong opinion that there is a material difference between a contract of mortgage, in the form in which mortgages are well known and recognised in this country, and a deposit by way of bailment or pledge for the purpose of securing the return of a sum of money.

In the case of a ship, the contract of mortgage, as appears from the early Shipping Acts, was formerly one which was supposed to vest the entire ownership in the mortgagee, insomuch, that, previously to the passing of the recent Merchant Shipping Act, the contention used to be, that not only mortgagees in possession, but mortgagees who had not yet taken possession, were to be held liable in respect of contracts entered into with regard to the ship.

Then came the Act 6 Geo. 4, c. 110, which provided that the mortgagee should not be deemed to be the owner, "except so far as might be necessary for the purpose of rendering the ship available by sale, or otherwise, for the payment" of his debt. But this Act was held, in *Dean v. M'Ghie* (a), to have been intended for the protection of the mortgagee, and not in restriction of his rights. Its object, Chief Justice *Best* observes, "was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were before liable. It does not prevent them from becoming legal owners, or apply to cases in which the mortgagee has reduced the ship into possession." And he notices, that, on the contrary, there is, in the 45th section of the Act, an express proviso, enabling the mortgagee to take possession for the purpose of sale or otherwise, for the purpose of discharging the debt due to

(a) 4 Bing. 45.

him (a). The very term "otherwise" would seem to imply strongly that the Legislature intended the mortgagee to be at liberty to make the ship available by user—the only mode other than sale by which he could do so, unless it was intended to refer to a submortgage, or to the transfer of a mortgage—a view not adopted by the Judges in that case, Chief Justice *Best* considering that it included the actual user of the ship.

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It is also familiar law, that a mortgage of a mill passes the machinery; and it would be a novel proposition in this Court, that the mortgagee of a mill, having entered into possession, is not entitled to use the machinery, but must keep it unemployed, on account of the doctrine advanced in argument, that he is a mere depository of chattels.

This question, however, is one upon which it is needless for me to do more than to express my opinion as to what would have been the result, if I had not felt satisfied that I can determine the case upon the agreements themselves.

The agreements are these:—The two companies having entered into a contract for amalgamation, which was *ultra vires*, it was stipulated by the agreement of September, 1857, that application should be made to Parliament for powers to amalgamate: and it was provided by the same agreement, which was also called "a working agreement," that the Defendants should work out the Plaintiffs' contracts with the Government, by means of the Plaintiffs' stock of ships. In the meantime, the Plaintiffs, being in want of money, and unable to pay for the completion of the *Tasmanian*, enter into the two agreements of December, 1857. By the first of these agreements, they gave the Defendants the absolute right to register themselves as owners of that ship, as soon as she was completed. That is not altogether an uncommon form of agreement. There

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have been instances of it in this Court with reference to ships from the colonies, where persons advancing the money requisite for the ship have been in the first instance the registered owners. Registration as absolute owners would not, however, be conclusive, if that circumstance stood alone. But the parties enter into a collateral agreement, which imposes on the Defendants the condition of holding the ship by way of pledge, contemplating, however, that, though held by way of pledge, some time is to elapse before she can be sold. It is not until two months should have elapsed after a demand for payment, that, in default of payment, a sale can be made by the Defendants; and then it is to be a mere power, not a trust for sale.

The collateral agreement in effect is this:—In the first place, the Plaintiffs agree—an agreement which they have broken—to complete the ship at their own expense. Secondly, if the Defendants shall advance any sum of money to complete the ship, which they were not bound to do, the Plaintiffs agree that such advance shall form a preferable claim on the ship. This advance the Defendants have made to the extent of 21,000*l.*, and have obtained a preferable claim accordingly. Thirdly, the Defendants agree, that, after payment of the advance, if any, to be so made by them, they will hold the ship as a security for various claims, *pari passu*, among which they have themselves a large claim. Then there is, fourthly, the provision I have already referred to, that, after the advances and claims have been payable, and unpaid for two months after demand in writing, the Defendants are to be entitled to sell the ship, and to pay the advances and claims out of the proceeds. And, fifthly, the Defendants agree, in the event of such sale, to account for the balance; and also, that, in case the advances and claims are satisfied by the Plaintiffs before a sale, they will reconvey the ship.

In effect, therefore, the parties contemplated two things:

first, the possibility of a redemption before sale of the ship ; secondly, the possibility of the mortgage remaining for a considerable time—for two months at least after demand made—outstanding before a sale of the ship under the power.

In the meantime, the ship, according to the Plaintiffs' contention, would have to remain entirely useless, at a dead loss to all parties concerned.

It seems to me, that such a state of things was not in any way contemplated by the parties to the agreements. They contemplated that the Defendants should be placed in the position of owners, subject to the agreement to reconvey on actual payment (of which there is not the slightest chance) by the Plaintiffs. If not repaid, the Defendants were to have a right to demand their money ; but even then, it is not until two months after such demand, that they can take steps for securing themselves by selling the ship.

In that state of things, I am not in a position to restrain the Defendants from using the ship as they propose. In the absence of fraud—and fraud is not alleged—they have a right to use the ship ; and so, in the words of the Act, "to make it available as a security for the mortgage debt." I am inclined to think they would have that right as simple mortgagees. I am clear, that they have it under the agreements which have been entered into.

I must, therefore, refuse the motion ; and, as the Plaintiffs' company is being wound up, I must refuse it with costs.

Ordered accordingly.

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V. C. Wood,
March 3rd.LORDS JUSTICES,
April 19th.Joint Stock
Companies
Winding-up
Acts—Contributory—Directors—Ultra Vires—Standing Orders of Parliament—Fraud on—Register.IN RE THE NORTH SHIELDS QUAY AND
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IN the year 1849, a scheme was projected for the formation of a quay on the river *Tyne*, at *North Shields*; and in the year 1851, an Act was passed, by which the Corporation of *Tynemouth* were constituted commissioners to construct such quay and approaches, and were empowered to raise money for that purpose.

The parties who subscribe the usual subscribers' agreement of a projected joint stock company become co-contractors with each other, and are bound to each other by the terms of the agreement; and if it should appear that there has been any special dealing between two or more of their body, tending to vary the operation of the agreement, the rest cannot be affected by that circumstance, except so far as they are shown to have been cognisant of and to have acquiesced in the transaction, so that their consciences are bound.

Provisional directors of a company, to be incorporated by Act of Parliament, propose to a contractor that he shall have the contract for the company's works, provided he will accept payment partly in shares, the number of shares to be settled by the company's engineer, but contractor to sign the subscribers' agreement for a sufficient number to make up the amount required by the Standing Orders of Parliament. The contractor having accordingly signed for 620 shares of 10*l.* each, and the Act having then been obtained, he sends in a tender, which is accepted by the directors, agreeing to execute the works for 24,000*l.*, to be paid, as to 3000*l.*, in shares. The scheme being abandoned before the works were commenced:—

Held (1.) Upon the construction of the deed, that the arrangement made by the directors with the contractor was ultra vires.

(2.) That, if not a fraud on the Standing Orders of the House of Lords (as to which *quære*), it was void as against such of the parties subscribing the deed as were not privy to it.

(3.) That the circumstance of the contractor having signed the deed last but one, the last subscriber being privy to the arrangement, did not alter the rights of those subscribers to the deed who were not privy to it.

(4.) That, as no call had been made, nor any thing done to call the attention of the subscribers to the number of shares for which any subscriber was registered, the circumstance of the contractor having been registered for nearly four years as the holder of only ten shares, did not preclude the company from insisting that he was liable for the whole 620.

Held, therefore, that (whatever equity the contractor might have against the directors), as against the company, he must be included in the list of contributories for the entire number of shares for which he had signed the deed.

Costs—Joint Stock Companies Winding-up Acts.

A shareholder, who has failed before the Chief Clerk in an attempt to have his name removed from the list of contributories, and adjourns the question into Court, if he fails on the hearing in Court, pays all the costs of that hearing.

(a) Report delayed for want of papers.

The commissioners being unable to raise the money, the project was dropped until the year 1853, when it was proposed to form a joint-stock company to take a transfer of the Commissioners' Act of 1851, and to provide the requisite capital by means of shares.

A negotiation was then opened on behalf of the provisional directors of the projected company with Mr. *Davidson*, a contractor, by which, according to the affidavits filed on behalf of that gentleman, it was proposed that Mr. *Davidson* should have the contract for the works to be executed, provided he would accept payment of the amount of his contract partly in money, and partly in shares in the company; that the number of shares to be ultimately taken by him, should be settled by the company's engineer, when the amount of the contract was ascertained; but that in the meanwhile Mr. *Davidson* should sign the subscribers' agreement for a sufficient number of shares to enable the company to make up the amount required by the Standing Orders of Parliament before their bill could be introduced.

This proposal was accepted by Mr. *Davidson*.

The subscribers' agreement bore date the 15th of December, 1853. It purported to be made between all the subscribers thereto of the one part, and a covenantee on the part of the company, of the other part; and thereby, after reciting that a certain number of persons had formed themselves into a company, called the *North Shields Quay Company*, for the purpose of accepting a transfer of certain powers under the Act of 1851; and that the parties thereto of the first part had respectively agreed to subscribe for the number of shares in the company set opposite to their respective names at the foot of the deed, and to enter into the agreements thereafter contained,—the parties of the first part stipulated that the capital of the company should

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consist of 21,000*l.*, divided into 2100 shares of 10*l.* each; and (by the 9th clause of the deed), that, until an Act or Acts should be obtained for the incorporation of the company, provisional directors should control the funds, and manage the business of the company, in such a manner and subject to such rules and regulations as they might think expedient, with power to increase or reduce the capital of the company, and to enter into contracts for any purpose whatever in the name and on behalf of the company; but all contracts so entered into not being contracts for services, or making surveys, or for the performance of acts necessary for attaining such Act or Acts of Parliament as aforesaid, should be made conditionally upon such Act or Acts of Parliament being obtained; and the directors might exercise all the powers thereby given them, although the whole amount of the proposed capital might not have been subscribed prior to the obtaining of an Act or Acts of Parliament. And lastly, "that each of the several persons parties thereto of the first part respectively, his or her heirs, executors, or administrators, would well and truly pay the amount subscribed by each of them respectively, or such part thereof as should not have been paid by them respectively at the date of their respective signatures to the deed, in such sums and at such places and times as should be required by any Act or Acts to be applied for as aforesaid."

This deed was signed by twelve persons for 1575 shares, representing 15,750*l.*, or three-fourths of the proposed capital, Mr. *Davidson* signing for 620 of such shares, representing 6200*l.* Mr. *Davidson's* name stood as the eleventh upon the deed, the twelfth being that of a gentleman who was cognisant, when he signed, of the negotiation between Mr. *Davidson* and the provisional directors of the company. Of the remaining ten, five were not shown to have been aware of that negotiation.

The company obtained their Act on the 31st of July, 1854. By the 3rd section of this Act, it was enacted, that several persons there named, and all others who had then already subscribed or should thereafter subscribe to the undertaking, should be united into a company for the purposes of the Act. The Act incorporated the Companies Clauses Consolidation Act.

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The register of shareholders was sealed on the 23rd of August, 1854, at what purported to be the first ordinary half yearly general meeting of the company, but which was, in fact, attended by only one shareholder having two proxies.

Mr. *Davidson* was upon the register as the holder of ten shares only.

On the 23rd of December, 1854, Mr. *Davidson*, at the request of the directors, sent in a tender, by which he proposed to execute the works for 24,000*l.*, and to accept 3000*l.* of that amount in shares pro rata as the works proceeded, to be paid monthly upon the certificate of the company's engineer. This tender was accepted, but Mr. *Davidson* was never required to act upon it. The company, being unable to raise the remainder of their projected capital, abandoned their undertaking; and in 1857, an order was made for winding up their affairs.

The official manager included Mr. *Davidson* in his list of contributories for the whole of the 620 shares; and in settling the list in chambers, the Chief Clerk was of opinion that Mr. *Davidson* should be included in the list for the whole of that number; but, at the request of the latter, the case was adjourned into Court.

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Mr. *Rolt*, Q. C., and Mr. *Rooburgh*, for the official manager, now moved that Mr. *Davidson's* name might be included in the list of contributories for all the 620 shares, upon the ground that he had signed the subscribers' agreement for the whole of that number.

Mr. *Daniel*, Q. C., and Mr. *Rogers*, on behalf of Mr. *Davidson*, contended that he was not liable to be placed on the list of contributories in respect of any of the shares in question.

It is true, he signed the deed, but he was relieved from the liability which he would otherwise have incurred by so doing, by the arrangement between himself and the directors, which amounted in effect to this, that he should take only so many shares as might be necessary for the purpose of his contract; and as the contract had been abandoned by the company, the liability of the contractor was at an end.

That arrangement did not infringe the Standing Orders of the House of Lords, for the same amount would be contributed in labour which those Orders required to be contributed in money; nor did it affect any of those who joined with Mr. *Davidson* in signing the subscribers' agreement, since his name stood last but one upon the deed, the subscriber who signed after him being one of those who were cognisant of the arrangement between Mr. *Davidson* and the directors.

That the provisional directors had power to enter into such an arrangement before the passing of their Act, is clear from the 9th section of the subscribers' agreement, from which it is apparent that they were the proper parties to determine the proportions in which the contractor was to be paid in money and in shares respectively, and how many

shares he was to take. And here that arrangement had been ratified by them as directors since the passing of the Act.

Besides, even if the directors, in entering into this arrangement with Mr. *Davidson*, exceeded their powers as directors, still they represented the entire company, and acted as the agents of the entire company, which could only act through their instrumentality. The interests of society require that representations and arrangements made by directors should bind the entire corporation on whose behalf they act: *The National Exchange Company of Glasgow v. Drew*(a).

Here the actual contract was, that Mr. *Davidson* should take only so many shares as the company's own engineer should think reasonable. He could not have insisted on being placed on the register for more, and, if so, the company cannot have the correlative right of placing him there for more.

Assuming, however, that the company had formerly a right to insist that Mr. *Davidson* ought to be registered for all the 620 shares, they have lost that right by their own laches, and the utmost for which he can be held liable is the ten shares for which his name appears on the register of the company. It is now nearly ten years since that register was completed and sealed. During the whole of that period it has been open to inspection by all the shareholders. They must be taken to have known its contents, and, having acquiesced in Mr. *Davidson* being there registered for ten shares only, it is now too late for them to insist on having him registered for the remainder of the 620 shares. Had they insisted on this right earlier, it

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(a) 2 Macq. H. L. C. 103, 120.

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would have been competent to Mr. *Davidson* to transfer his shares, and thus relieve himself from the liabilities with which it is now attempted to fix him.

[The following cases were also cited : *Preston v. The Grand Collier Dock Company*(a), *Mangles v. The Grand Collier Dock Company*(b), *Kidwelly Canal Company v. Raby*(c), *In re The Marylebone Banking Company*; *Davidson's case*(d), *Holt's case*(e), and *Williams v. Page*(f).]

A reply was not heard.

Judgment.
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VICE-CHANCELLOR SIR W. PAGE WOOD :—

Both upon principle and upon the authorities Mr. *Davidson* must be held liable for that which he has bound himself to do by the subscribers' agreement.

[His Honour stated the effect of the subscribers' agreement as above, and proceeded.]

With reference to the covenant by which the subscribers bind themselves to pay the amount subscribed by each of them respectively, in such sums and at such places and times as shall be required by any Act or Acts to be applied for as therein mentioned, I apprehend the true construction is, that they will pay such sums of money, *in respect of calls* and the like, as shall be required by the Act which is to be applied for. That Act incorporated the usual Companies Clauses Act, which gives the directors the power of appointing the time and place at which calls shall be made.

(a) 2 Railw. Ca. 335.

(b) Id. 359.

(c) 2 Price, 93.

(d) 3 De G. & Sm. 21.

(e) 1 Sim. N. S. 389

(f) 4 Jur. N. S.

The effect, therefore, of the covenant is, that the subscribers will pay all the calls according to the usual mode prescribed by the Companies Clauses Act.

The subscribers' agreement was signed by some five persons besides those who are shown to have been more immediately concerned in the transactions to which I am about to advert.

When an agreement of this kind is signed, the parties signing it become co-contractors with each other, and are bound to each other by the terms of the agreement; and if it should appear that there has been any special dealing between two or more of their body, tending to vary the operation of the agreement, the rest cannot be affected by that circumstance, except so far as they are shown to have been cognisant of and to have acquiesced in the transaction, so that their consciences are bound. As regards all those who have not assented to the transaction, and whose consciences are not so bound, the agreement will stand in its entirety.

In the present case, Mr. *Davidson* admits that he has executed an agreement, by which ostensibly he binds himself to take 620 shares, and to pay the calls thereon at the time and in the manner prescribed by the Act of Parliament; but his contention is, that he is relieved from that obligation by reason of an arrangement previously entered into between himself and some of his co-contractors, who were provisional directors of the company, to the effect that he should work out the amount of his shares instead of paying the calls according to his covenant; and, further, that the mention of 620 shares was merely provisional, the real arrangement between himself and the directors being, that he was to take only so many shares as should be

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settled by the company's engineer, when the amount of the contract should be ascertained, the shares so taken having to be paid for by him in work, and not in money.

The question is, whether, by virtue of their powers as provisional directors, or otherwise, the persons with whom this arrangement is alleged to have been entered into, had authority to introduce into the contract, which I must look for within the four corners of the subscribers' agreement, a stipulation such as that which I have described.

It was argued, that the agreement on which *Mr. Davidson* relies, would not be a fraud upon the Standing Orders of the House of Lords, inasmuch as the amount which those Orders require to be subscribed for in the shape of capital, before the House will sanction an undertaking of this nature, would be fully made up in the form of labour. To this there is an obvious answer: that the arrangement on which *Mr. Davidson* insists, is not an absolute stipulation on his part to do 6200*l.* worth of work, but only to do so much work as might be required to carry out the contract. Whether that answer is sufficient, I will not stay to inquire, for this is not the pressing part of the case.

The really pressing part of the case is, the effect of the alleged arrangement between *Mr. Davidson* and the provisional directors upon such of his co-contractors under the subscribers' agreement as are not shown to have been cognisant of that arrangement. They sign the subscribers' agreement in the faith that every other person by whom it is signed, is to be bound as much as themselves to carry all its provisions into effect, modo et formâ, as expressed in the deed. As to several of them, this circumstance is deposed to upon their oath, although I do not think it material it should be so, because the onus is on *Mr. Davidson* to show the contrary.

In reference to this part of the case, it was argued, that Mr. *Davidson*, by signing the deed, has misled no one, since his name stands last but one on the deed, the last signature being that of a gentleman who appears to have been cognisant of the transaction between Mr. *Davidson* and the directors. But to that argument the answer is plain: all the subscribers to the deed who knew that an application was about to be made for an Act of Parliament, must be taken to have known that such an Act could not be obtained, unless the full amount of capital required by the Standing Orders of Parliament were previously subscribed for. They knew that Mr. *Davidson* was a subscriber for the 620 shares, and they must of course have known that it would be useless to apply for their Act, if Mr. *Davidson* were not bound by the deed. With that knowledge, they did apply for an Act of Parliament; and I must take them to have done so upon the faith of his signature, which nearly completed the amount requisite for effectually carrying out the works. That being so, I am entitled to say on their behalf,—they being absent parties throughout the whole of this inquiry, and only represented by the official manager,—that they are not bound by the arrangement entered into by the directors with Mr. *Davidson*. The directors had no power, under the 9th clause of the subscribers' agreement, to release any subscriber to that deed from the contract into which he had entered by signing it, or to arrange with Mr. *Davidson*, that, instead of paying for his shares in the mode prescribed by the deed, he should pay for them in some other mode, namely, by work to be done by him as contractor;—still less were they empowered by that clause to stipulate, that if they did not take out the value of his shares in work, he should be released from them altogether.

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The case, as it stands on the subscribers' agreement, seems to me too clear for argument. And I apprehend that the

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decision of the House of Lords in *The National Exchange Company of Glasgow v. Drew* (a) can have no bearing upon it. In that case, the directors of a company having made certain representations to the public at large, the general body of the shareholders were held to be bound. It is satisfactory to find an authority of that description; and it is earnestly to be hoped that some rational system will ere long be established, by which companies will be held to make good their engagements. But that decision has no application to a case like the present. Here, no representation has been made, or act done, by the company or by its directors, with reference to third persons. The question is simply, whether a gentleman, who has deliberately entered into a certain contract with others, without disclosing to them another and distinct arrangement into which he has entered, and by which their rights under the contract are materially affected, is at liberty to insist on that distinct arrangement, in order to avoid the effect of his contract. Clearly it was the duty of Mr. *Davidson*, if he meant to insist upon any such arrangement as the present, to inform all his co-contractors of the actual state of things; and, as they were pursuing the undertaking upon the faith of his signature, to state distinctly that his signature did not mean anything like what they supposed it to mean, but something entirely different, by reason of a private arrangement between himself and the directors of the company.

The next question is, whether the Act of Parliament places the case in a different position from that in which it would stand if it rested simply on the deed.

The Act directs, by the 3rd section, that certain persons there named, including some who signed the deed, and all others who had then already subscribed, or should there-

(a) 2 Macq. H. L. Ca. 103, 120.

after subscribe to the undertaking, should be united into a company for the purposes of the Act. Then it incorporates the Companies Clauses Consolidation Act, which, by its 8th section, enacts "that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company." No doubt the effect of that section is, that the person's name must be entered on the shareholders' list before he can sue or be sued. I am not aware whether that has ever been actually held with reference to an original shareholder, but in *The Newry and Enniskillen Railway Company v. Edmunds (a)*, it was so held with reference to a transferee of shares; and doubtless it would be very imprudent to bring an action before the person's name is entered on the register of shareholders. But the mere circumstance of registration or non-registration does not vary the rights of the parties. Every co-contractor upon the subscription contract has a right to say it was upon the faith of the capital being found in the manner prescribed by that deed, that he concurred in the undertaking, and to insist that every person who has signed the deed has become liable as a shareholder to the full amount of the shares for which he has signed, and should be placed on the register of shareholders accordingly.

It was argued that Mr. *Davidson* could not have insisted upon being placed on the register of shareholders. But, assuming that to be the case, I do not know that it would follow as a correlative proposition, that the company would not have a right to place him on the register; he might have so conducted himself as to prevent him from

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(a) 5 Railw. Ca. 275.

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insisting, as against the directors, upon being placed on the register; while, on the other hand, the company, as a body, would not be bound, at his request, to release him from liability.

Independently of that, I take it that the true result of his dealings with the directors was not to preclude him from insisting upon being placed upon the register; and that he was as much entitled to insist upon being placed on the register, as the company were entitled to insist on having him placed there. But the question, what equities would affect his shares when he was on the register, would be a question between him and the directors with whom he entered into the arrangement.

The next question raised was, as to the effect of the proceedings which took place on the part of the directors, after the company was formed. As to this, it appears to me, that the directors had no more power, after the company was formed than they had before, to say that Mr. *Davidson* should be released from any portion of the 620 shares for which he subscribed. It might possibly have been open to them to agree with him, that, as to the 300 of his 620 shares, whenever a call was made, they would set off the amount of the call against work done by him, so as to entitle him to say, eventually, that those shares had been fully paid up. But it was not open to them to do what their agreement in effect amounts to, namely, to cancel so many of the company's shares, and to reduce the entire number of the company's shares by that amount. That was an act entirely beyond their powers. All they had power to do after the Act was passed, was to place the subscribers' names upon the register according to the number of shares for which they subscribed. He would then have had an opportunity of selling his shares. The transferee might have been insolvent; but that the company would



not have been able to help. They would have had a shareholder upon the register against whom they would be entitled to proceed, whatever might be the result of such procedure; and that is all to which they would have been entitled.

It was argued, that calls could not have been made upon the 620 shares, because Mr. *Davidson* was not registered as the proprietor of them. It may well be held,—although I do not think the point has yet been determined,—that an original shareholder cannot be sued until he has been registered. But it is equally certain, that the register of shareholders is not conclusive evidence as to who are, and who are not, contributories. The Court can put those on the list of contributories who are not registered as shareholders, and can strike out from the list of contributories those who are so registered. The register is *primâ facie* evidence with which those should be armed who seek to make a person liable as a contributory; but when the question comes to be considered, whether Mr. *Davidson's* name ought not to be upon the list of contributories, it appears to me that the company were clearly entitled to say, that he ought to be registered for the whole of the 620 shares; and, under the Winding-up Acts, it must be taken as if he had been so registered, and he must be considered as a *bonâ fide* shareholder of the company.

It was then argued, that, whatever right the company may formerly have had to insist that Mr. *Davidson* ought to be registered for the whole of the 620 shares, that right has since been forfeited, inasmuch as it is now nearly four years since the register of shareholders was made out, in which Mr. *Davidson* was registered as the proprietor of only ten shares out of the 620. During the whole of those four years, it is said the register was open to inspection by all the shareholders; they ought and must be

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taken to have seen it ; and having stood by for so long a period, it is now too late for them to insist on their right to have Mr. *Davidson* registered for the remainder of the shares for which he subscribed.

It does not appear to me that anything has passed to raise an equity of that description against the general body of shareholders. What actually happened was as follows :—A general meeting was summoned pursuant to the Act, at which every shareholder no doubt was invited to attend, and might have attended. That meeting was, in fact, attended by a single shareholder only. As he held the proxies of two other shareholders, it was considered to have been a valid meeting. Whether that state of circumstances satisfied the provision of the Act of Parliament, which requires the attendance of three shareholders to constitute a valid meeting, I do not stay to inquire. The single shareholder, armed with the two proxies, having voted his own salary, and that of other members of the company, I doubt not to his own satisfaction, proceeded to set the company's seal to a list of shareholders, on which Mr. *Davidson* is entered as the proprietor of ten shares. It appears that no call has been made since the Act was passed. No works have been executed, nor has anything been done, to direct the attention of any shareholder, directly or indirectly, to the position of himself or any other shareholder, with reference to the number of shares for which he was entered on the register. Any observations, therefore, which might have been made, if the attention of the shareholders had been directed to the actual state of the register, are inapplicable. I apprehend that the mere circumstance of one or more shareholders putting down, contrary to their duty, ten shares for a person who has subscribed for 620, cannot be held to be binding upon absent shareholders, who have no knowledge of the transaction ; and who, if present, would not have had any authority

to bind a single absent shareholder to such a transaction. If every shareholder except one had been present at a meeting held for this purpose, and had chosen to put down Mr. *Davidson* for ten shares, when he had subscribed for 620, the attempt, on their part, to release him from the rest of his engagement, would have been clearly ultra vires.

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As to the argument, that, not being on the list for the residue of the 620 shares, he was precluded from dealing with them as he might otherwise have done, the laches were all his own. He might have come forward at any time, demanding to be put upon the list for the whole of the 620 shares.

It appears to me, that his co-contractors have a perfect right to say, that they are not to be bound by any transaction which took place ultra vires on the part of any other member of the company; and, therefore, however unfortunate the result may be, and whatever equity Mr. *Davidson* may have against those who led him into his present difficulty, he has no right, as against the company, to say that he is not the holder of all the shares for which he subscribed the deed.

His name, therefore, will remain on the list for the 620 shares.

Mr. *Roxburgh* asked for the costs of the application, upon the ground that it had been adjourned into Court at the request of Mr. *Davidson*.

The VICE-CHANCELLOR.—Wherever there has been the additional expense of a second hearing at the request of a shareholder seeking to have his name removed from the list of contributories, and the shareholder has failed, I have

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ordered him to pay the costs of the second hearing; and for this reason:—the Chief Clerk has no power to decide any of these questions; and the parties are always invited, before they enter into a discussion of the kind, to state whether they wish for the presence of the judge. If they decline, and choose to go on before the Chief Clerk, they take the chance of a second hearing being necessary; and if they fail on a second hearing, they are the persons who ought to suffer.

LORDS JUSTICES.
 April 19th.

On appeal to the LORDS JUSTICES, the foregoing decision was affirmed.

June 4th.

BROWN v. BROWN.

*East India
 Stock—3 & 4
 Will. 4, c. 85—
 "Government or
 Parliamentary
 Stock or Fund"
 —"Foreign
 Stock or Fund."*

While the Act 3 & 4 Will. 4, c. 85, for the regulation of the East India Company's Charter, was in force, the capital stock of the company was not "a Government or Parliamentary stock or fund," nor was it "a foreign stock or fund."

THOMAS BROWN, by his will, in 1842, bequeathed all the moneys to which he might be entitled at his death in the hands of his bankers, "and all the sums in the Government or Parliamentary stocks or funds, or any foreign stocks or funds," and all moneys whatsoever due to him on mortgage, bond, or simple contract, and all debts owing to him on any account, and all arrears of rent which might be due to him at his death, subject to the payment of debts and legacies, upon trusts for the benefit of his wife, the Defendant *Sarah Brown*, during her life, and, after her decease, upon certain trusts under which, in the events which happened, the Plaintiffs became entitled absolutely. He then bequeathed all his ready money in his dwelling-houses, and all his household goods and furniture, and all the rest, residue, and remainder of his personal estate and effects to his wife absolutely.

The testator died in 1852.

The testator had, at his decease, amongst other stocks and funds, a sum of 3000*l.* *East India* stock. And the principal question discussed at the hearing of the cause was, whether that sum formed part of the property comprised in the specific bequest under which the Plaintiffs were interested in remainder expectant on the determination of the Defendant's life interest therein, or whether it formed part of the residue by the will bequeathed to the Defendant absolutely.

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Mr. *James*, Q. C., and Mr. *Druce*, for the Plaintiffs, contended, that the stock in question formed part of the property comprised in the specific bequest.

Argument.

At the time of the testator's death, the character of *East India* stock was determined by the company's charter, as regulated by the Act 3 & 4 Will. 4, c. 85. Prior to the time when that Act came into operation, *East India* stock was in the same position as the stock of any other private company; but, by the provisions of that Act, it was converted into a Government or Parliamentary stock.

The VICE-CHANCELLOR.—The *British* Government does not appear by that Act to guarantee anything to the holders of such stock.

Mr. *James*.—Not out of the revenues of this country; but that is immaterial, provided it be guaranteed out of the revenues of any part of the *British* dominions. By the operation of the Act the *Indian* government became a department of the State. All the company's property, real and personal, became vested in the company simply as trustees for the Crown. All their revenues were placed

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under the control of the *British* Government, and that alone; and the dividends upon their stock being payable out of those revenues, the stock itself must be a "Government or Parliamentary stock or fund."

If not, then the 3000*l.* in question must have passed under the words "foreign stock or fund," the testator having clearly intended, by the general description contained in the specific bequest, to comprise all stocks or funds.

Mr. *Rolt*, Q.C., for the Defendant, was not heard upon this point.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

As to the *East India* stock, I think it sufficiently clear, without calling upon the Defendant's counsel, that it did not pass either by the words "Government or Parliamentary stocks or funds," or by the words "or any foreign stocks or funds."

In order to come within the description "Government or Parliamentary stocks or funds," a fund ought to be either managed by Parliament, or paid out of the revenues of the *British* Government, or, at least, guaranteed by that Government.

Now, as regards *East India* stock, it was originally no more than a sum lent to a company of traders, and in that position it remained when the Act 3 & 4 Will. 4, c. 85, came into operation. The question, therefore, is, whether its character has been altered by any of the provisions of that Act.

The Act 3 & 4 Will. 4, c. 85, recites that the *East India*

Company have consented that all their rights and interests to or in the *British* territories in *India*, and all their territorial and commercial, real and personal, assets and property whatsoever, shall, subject to the debts and liabilities then affecting the same, be placed at the disposal of Parliament. And then it enacts, that, from and after the 22nd of April, 1834, all the Company's territories, (except *St. Helena*), and all the lands and hereditaments, revenues, rents, and profits of the company, and all the real and personal estate whatsoever (except *St. Helena*), subject to the debts and liabilities then affecting the same respectively, and all the rights in the Act mentioned, shall remain and be vested in, and be held, received, and exercised respectively by the Company, in trust for his Majesty, his heirs and successors, for the service of the government of *India*, "discharged of all claims of the said Company to any profit or advantage therefrom to their own use, *except the dividend on their capital stock*, secured to them as thereafter mentioned."

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The dividend, therefore, upon their capital stock, forms no part of the property of which the Act makes the company trustees for the Crown. That is to be a subsisting claim which the company are to retain (a), in the first instance, out of the revenues of which the Act makes them trustees for the Government, subject to that as a subsisting charge. Nor does the Government incur any liability in respect of this dividend. It takes no interest in the company's property until the dividend is paid. The Act does not say, the company are to hold all their real and personal property in trust for the Government, the Government then paying back these dividends ; but the dividends are excepted from the property in which the Government is to have the beneficial interest.

(a) See sect. 11.

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If ever the whole of the *British* territories are taken away from the company, then, no doubt, by the effect of the 13th section of the Act, the company's capital stock may become a Government fund. The 13th section enacts, that, if on or at any time after the 30th of April, 1854, the company "shall, by the expiration of the term granted by the Act, cease to retain, or shall, by the authority of Parliament, be deprived of the possession and government of the said territories, it shall be lawful for the company, within a year thereafter, to demand the redemption of the said dividend, and provision shall be made for redeeming the said dividend, after the rate aforesaid, within three years after such demand"(a). But, in the mean time, the *East India* Company alone are responsible for any malfeasance by which their revenues may be affected; and if their revenues fall short, there is no guarantee, on the part of the *British* Government, that the company will receive a single shilling by way of dividend.

As to whether the stock in question can pass under the words "or any foreign stock or fund," it is clear to me that it cannot. It is not in any respect a foreign stock. The company is a *British* company, as much as any insurance or other company in *Great Britain*.

I must, therefore, hold, that the 3000*l.* *East India* stock formed no part of the property comprised in the specific bequest under which the Plaintiffs are interested in remainder expectant on the determination of the Defendant's life interest therein.

(a) Sect. 13.

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MADDISON AND WIFE v. CHAPMAN.

July 8th & 12th.

THOMAS CHAPMAN, by his will, in 1850, devised as follows:—"After my funeral and testamentary expenses are paid by my executrix hereinafter named, my will is, that all my lands, houses, tenements, and real and personal property, situate at *Binbrooke*, or elsewhere, and of what nature or kind soever (except household furniture and plate) shall, at the time my youngest child has attained the age of twenty-one years, be valued, and divided into three equal parts, which division shall be made without selling the land; one part to be for my dear wife *Eve*

Will—Construction—Limitation over—Contingencies, apparent and real—Vested Interests—Codicil—Revocation—"Minority."

Where there is, in a will, a limitation over, which, though expressed in the form of a

contingent limitation, is, in fact, merely dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold, that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited.

But, in order that this rule of construction may be applied, the condition, upon which the limitation over is made dependent, must involve no incident but what is essential to the determination of the interests previously limited.

Codicil—Revocation.—The onus is upon those who claim under a codicil, as against devisees under the will, to show that the intention to displace the devisee is equally clear with the original intention to devise.

Minority.—If the whole tenor of a will be such as clearly indicates that the testator has used the word "minority" to mean the whole of the period during which he has kept a devisee out of the full control over the devised property, the Court may adopt that interpretation. Otherwise, the word must be strictly construed.

Testator by his will directed, that, when the youngest of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts, one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters: and provided either of his two daughters should die before a division of the property should have been made, and having no issue, then the part of the deceased to be given to her surviving sister. By a codicil, *should both his children die in their minority* and leave no issue, then in such case, and in such case only, he gave the whole of his property to his wife for life, with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age, and without having been married.

Held, that, whether the interests under the will were vested or not, and whether a reasonable motive could or could not be assigned for the condition upon which the testator had made the limitation over in the codicil to depend (the death of both his daughters in their minority), that condition must be construed strictly; and the event not having happened, the limitation over—*Held*, not to take effect.

But, *semble*, the interests under the will were vested interests.

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Chapman, one part for my daughter *Mary Ann*, and one part to my daughter *Maria*; and provided my daughter *Mary Ann* wishes to leave the family when she has attained the age of twenty-one years, she shall have 500*l.* given to her, without paying interest for the same, but which shall be accounted for as part of her share at the time when the general division is made. Any money paid in as principal, either from the Bank, from notes, or from any other source, shall be put out to interest at the discretion of the trustees hereinafter named, so that the property may not be diminished; and at my wife's decease, her share of the above-named property shall be equally divided between my two children above named, share and share alike. And provided that either of my two children above named should die before a division of the property shall have been made as above described, and having no surviving issue, then the part of the deceased shall be given to her surviving sister; but if either of them shall die, and leave surviving issue, then the part of her so dying shall be equally divided amongst her surviving children in equal shares and proportions. All interest of money, rents of lands, houses, or tenements, shall be applied to the support of my wife, and to the support of my children and their education during their minority, or the minority of either of them; and likewise that each of my daughters shall have 10*l.* a year for their own pocket-money during their minority, or until such division of the property is made as above described." The testator then bequeathed an annuity to his sister, and left the Defendants, *Benn* and *Cooke*, in trust of the above property.

The testator afterwards executed the following codicil without date:—"Should both my children die in their minority, and leave no issue, then in such case, and in such case only, I give to my wife, *Eve Chapman*, the whole of

my property for the term of her natural life, or so long only as she shall remain my widow ; and at my wife's decease, or marriage, which shall first happen, I then give to *James Cooke*" (meaning the Defendant *Cooke*) "all my lands and houses situate at *Binbrooke*, but to be chargeable with the payment of the annuity to my sister as above stated ; and the remainder of my property shall be at my wife's disposal."

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The testator had no child besides his daughters *Mary Ann* and *Maria*. He died in 1850. His elder daughter *Mary Ann* attained the age of twenty-one, and died in 1854, without having been married. His younger daughter, *Maria*, died in 1857, under the age of twenty-one, and without having been married.

The bill was filed by *Frances Maddison*, as heiress-at-law of *Maria Chapman*, against the testator's widow, *Eve Chapman*, and the trustees named in his will. It prayed for a declaration, that, in the events which had happened, of the death of *Mary Ann Chapman* in the lifetime of *Maria Chapman*, without having been married, and of the subsequent death of *Maria*, intestate, and without having been married, the Plaintiff *Frances Maddison*, as her heiress-at-law, and customary heiress, became and (subject to the marital rights of the Plaintiff, her husband) was now entitled to an equitable estate in fee simple in possession in two equal undivided third parts of the freehold and copyhold estates of the testator, and to an equitable estate in fee simple in remainder expectant upon the death of the Defendant *Eve Chapman*, in the remaining equal undivided third part of the same freehold and copyhold estates.

The Defendants, by their answer, submitted, that at the death of the testator part of the real estate in question was vested in him as trustee for his wife.

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It was also stated, but not proved, that the elder daughter left a will.

Mr. *Faber*, in the absence of Mr. *Rolt*, for the Plaintiffs :—

The condition mentioned in the codicil, “should *both* my daughters die in their minority,” has not been fulfilled, the testator’s eldest daughter having attained twenty-one. The gift over, therefore, in the codicil, being dependant upon that condition, failed to take effect, and the Plaintiffs are entitled to the declaration prayed by the bill.

As regards the suggestion, that the eldest daughter left a will, that circumstance, even if true, is immaterial; for the interests devised to the daughters by their father’s will are vested interests, and, on the decease of the eldest, her share passed by the limitation over to her younger sister, now represented by the Plaintiffs; consequently, it could not be affected by her will.

Mr. *James*, Q.C., and Mr. *W. D. Lewis*, for the Defendant *Eve Chapman*, and Mr. *Little* for the Defendant *Cooke* :—

Assuming that the word “minority” in the codicil is to be construed strictly as meaning a death under twenty-one, in which case, if the literal interpretation of the codicil is to be adopted, the limitation over has failed, still the Court will give effect to that limitation. Whether the interests given by the will to his daughters were vested or not vested, the testator could have had no reason for making the death of his eldest daughter, *during her minority*, an element of the condition upon which the limitation over, contained in the codicil, was to take effect; for whether she died during her minority, or subsequently, in either case, if she left no

issue surviving, her interest would ~~cease~~ under the will, in case of her younger sister dying under twenty-one; so that in these events it would be immaterial whether the elder daughter died during her minority, or subsequently.

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If the interests under the will be vested, as the Plaintiffs contend they are, this result is still more obvious; for in that case there are, under the will, a series of interests so limited, that in the event of the elder daughter attaining twenty-one, and dying in the lifetime of her sister and without leaving issue, all her interest passes to her sister by the limitation over; so that there could be no reason why the circumstance of her attaining twenty-one before she died, should impose a limit on the ulterior bounty which the testator, by his codicil, intended for others.

All the testator intended was, to provide, that, should both his children die in their minority, or in the minority of either of them, then the devise in the codicil should take effect.

Any other construction would impute a capricious intention to the testator; and where a literal, a strict, or an ordinary interpretation given to particular passages would disappoint the intention with which the instrument was obviously framed, the Court is bound to construe it accordingly: *Pearsall v. Simpson*(a), *Anonymous*(b), *Webb v. Hearing*(c), *Key v. Key*(d), and 1 Jarman on Wills, 408.

But in fact, according to the true construction of the codicil, the term "minority" ought not to be construed strictly, but must mean the period during which the testator has kept both his daughters out of the full control over their property, that is, the interval until the youngest

(a) 15 Ves. 29.

(c) Cro. Jac. 415.

(b) 2 Vent. 363.

(d) 4 D. M. G. 73, 84.

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attains twenty-one, the whole of that interval being, even as regards the eldest, a period of artificial minority. It is a familiar expression, that such an one does not come of age until twenty-five; and in *Milroy v. Milroy*(a), and other cases, the term "minority" has been expressly held to extend beyond twenty-one, and until, by the limitations in the will, the party is put into possession of his full rights.

[They cited, also, *Leeming v. Sherratt*(b), *Parker v. Sowerby*(c), *Kirkpatrick v. Kirkpatrick*(d), and *Franks v. Price*(e).]

Mr. *Faber*, in reply, cited *Grey v. Pearson*(f), to show that, notwithstanding the dicta in *Key v. Key*(g), the rule of the House of Lords in construing a codicil like the present was, to adhere to the ordinary sense of the words used by the testator; and as to the fallacy of the maxim that the rule of construction should be the intention of the testator.

Judgment reserved.

July 12th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD (after reading the will, and stating the facts of the case as above, proceeded as follows):—

Several questions naturally arise upon this will.

The first is, whether the interests by the will devised to the testator's two daughters are, or are not, vested interests.

If, as it was stated at the bar, the eldest daughter left a

(a) 14 Sim. 48.

(b) 2 Hare, 14, 23.

(c) 1 Drew. 488, 496.

(d) 13 Ves. 476.

(e) 3 Beav. 182, 208.

(f) 6 H. L. C. 106.

(g) 4 D. M. G. 84.

will, this question may be one of some importance to determine. At present, and in the absence of the persons claiming under her will, it would be scarcely proper to express a decided opinion upon the point. But the inclination of my opinion would unquestionably be, that the interests were vested in the daughters. It seems to me, that, upon the whole of his will, the testator intended to give his two daughters equal interests in all his property, subject, as to the third part given to his wife for life, to her life interest in that third part; and subject, as to the whole, to the chattel interest he has carved out, until his "youngest child" (which I take to mean the youngest of the two daughters, who are afterwards named in the will, and not the youngest child who might eventually be born,) has attained twenty-one. With those modifications, the testator, as I read his will, has simply directed an equal partition of all his property between his two daughters.

I had the same question of vesting to consider, under somewhat similar circumstances, in *Kavanagh v. Morland*(a), the only case I find precisely in point. There, the devise was, in effect, to the issue of a person named in the will, to be distributed between them equally as three barristers should think fit. The question was, whether the interests were vested in such issue as purchasers. And it appeared to me, that, inasmuch as the distribution was to be an equal distribution between the issue, without any power of altering the extent of the interest each individual was to take, the discretion given to the persons who were to determine how the distribution should be made, could not change the interests the issue were to take, or in any way affect the question, whether such interests were vested or contingent. Accordingly, I treated them as vested interests.

This point, however, as I said before, is not one to be

(a) Kay, 16, 27.

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determined in the absence of the persons claiming under the daughter's will; nor do I think it one which it is necessary to determine, so far as regards the Defendants to the present suit, who claim under the codicil to the will of this testator.

Before coming to the codicil, however, I should observe that the will itself is in several respects imperfect in expression. For instance, nothing is said precisely as to what is to be done with the shares to devolve on the testator's two daughters, in the event of their mother dying before the period of division;—which is another point somewhat in favour of the interests being vested. And, again, the gift over, in the event of either of the testator's daughters dying leaving children, to the children of that daughter, is only a gift of the original share of the daughter so dying, nothing being said as to any share that might come to her by accretion. I mention this, to show that the testator has by no means taken a clear and exhaustive view of the contingencies with which he is dealing—a circumstance very common when limitations of this kind are attempted to be made.

Then, by a codicil to his will, the testator devises as follows:—"Should both my children die in their minority, and leave no issue, then in such case, and in such case only, I give to my wife, *Eve Chapman*, the whole of my property for the term of her natural life, or so long only as she shall remain my widow; and at my wife's decease, or marriage, which shall first happen, I then give to *James Cooke* all my lands and houses situate at *Binbrooke*, but to be chargeable with the payment of the annuity to my sister as above stated: and the remainder of my property shall be at my wife's disposal."

That the event mentioned in the codicil has not hap-

pened is clear, for both the testator's children have not died in their minority. In terms, therefore, the limitation over contained in the codicil has failed. Nevertheless, there are two modes in which it was argued, on the part of the Defendants, that the Court could give effect to the limitation over.

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It was argued, first, that, whether the interests given by the will were vested or not vested, the testator could have had no reason for pointing out the death of his eldest daughter *during her minority*, as part of the contingency upon the happening of which his codicil was to take effect; for, whether that daughter died during her minority or subsequently, in either case, provided she left no issue surviving, her interest, it was said, would cease under the will in case the youngest daughter should die during her minority; so that, in those events, it would be a matter of no importance whether the elder daughter attained her majority or not.

But it is clear, that, if the interests under the will were not vested interests, that reasoning is not correct. If the interests under the will were not vested interests, then, in the event of the youngest daughter dying under twenty-one, the period fixed for a division of the property could never arrive; and in that event there would be, under the will, irrespective of the codicil, an intestacy with reference to the property; and, in contemplation of that event, it may well have been the testator's intention, in framing the codicil, that his eldest daughter should not lose any chance she might have of taking under that intestacy, unless she died in her minority and left no issue; but, on the contrary, that, on attaining twenty-one, in case she wished to marry or the like, she should be able to deal with that chance and limit it by settlement or will, or in such other manner as she might be advised. That consideration would afford abun-

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dant reason for the conclusion, that I ought not arbitrarily to construe the clause in question in the codicil as meaning something different from what is there expressed, upon the ground alleged, that the testator could have had no reason for wording it as he has done.

If the interests under the will were vested interests, then the argument from the want of motive seems a little more favourable to the contention of those who claim under the codicil. In that case, their argument is put thus: there are under the will a series of interests so limited, that, in the event of the eldest daughter attaining twenty-one, and dying in the lifetime of her sister and without leaving issue, all her interest passes to her sister by the limitation over; so that there could be no reason why the circumstance of her attaining twenty-one should impose any limit to the ulterior bounty which the testator, by his codicil, may have intended for others. But, at best, such an argument is unsatisfactory when in conflict with the words employed.

The second way in which the case was argued on the part of those who claim under the codicil was, that, according to the true construction of that instrument, the term "minority" must mean the period during which the testator has kept both his children out of the full control and power of exercising their rights over the property; they may take vested interests, but those interests are subject, it was said, to the intermediate interests which subsist up to the time when the youngest daughter attains twenty-one; and the whole of the period which intervenes until the happening of that event is, even as regards the eldest daughter, a period of quasi minority; as in cases where it has been held, that the "minority" of a child extended until he attained twenty-five, upon the ground that by the limitations in the will he was not put into possession of his full rights until he reached that age.

As regards the authorities that were cited, it appears to me, that, with the exception of the last to which I have referred, they do not touch the point before me.

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The class of authorities, of which *Pearsall v. Simpson*(a) may be taken as the leading case, merely establish, that, where there is a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, dependant upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold, that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited.

I apprehend, the true way of testing limitations of that nature is this: Can the words which in form import contingency, be read as equivalent to "subject to the interests previously limited?" Take the simplest case: A limitation to A. for life, remainder to B. for life, and, upon the decease of B., "if A. be dead," then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life interest (if any)*, to C. in fee.

That is an intelligible principle of construction; but, in order to its application, the condition upon which the limitation over is made dependant must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, "and if, at the death of B.,

(a) 15 Ves. 29.

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A. shall have died under the age of twenty-one," or "and if, at the death of B., A. shall have died without leaving children, then to C. in fee;" here, in either case, room is left for contingency. The condition of A.'s dying, in the first case, under twenty-one, and, in the second, without leaving children, is an event which may or may not have happened when the life estates in A. and B. are determined; and, until it has happened, the limitation over is contingent, not merely in appearance, but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply.

In the case before me, there is in the will a limitation to the eldest daughter, subject to be defeated (for I will assume it not to be a vested interest) upon her death at any period before the youngest attains twenty-one and after she has herself attained twenty-one; then there is in the codicil a limitation over in the event of the eldest dying "during her minority" only, and there is an interval of some years between the periods when the two daughters will attain twenty-one. The condition—the death of the eldest daughter before attaining twenty-one—is not merely an event essential to the determination of the interests previously given to her, but involves a further incident which may or may not have happened when that estate is determined. The limitation over, therefore, which is expressed to be dependant upon that condition, is strictly a contingent limitation; and I am not at liberty, upon the authority of *Pearsall v. Simpson*, and the other cases cited of that description, to construe it as simply equivalent to a limitation over, to take effect upon the mere determination by death at any age of the estate previously limited to the daughter.

And the reason is sufficiently clear. When I find a testator expressing this varied contingency—by his will

giving an interest which may be determined by a death after minority, and by his codicil making a limitation over, which is only to take effect in the event of death during minority,—it is impossible to know what he intended, or to foresee what he would have said had it been called to his attention that the two limitations did not coincide. In such a case, so far from feeling the certainty upon which Lord Justice *Knight Bruce* acted in *Key v. Key*(a), I confess I am quite uncertain as to what the testator would have done had the case been explained to him.

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Up to this I have been assuming the interest previously given by the will not to be vested. But the same reasoning would apply still more strongly in case it be a vested interest. A vested interest, previously given, is incapable of being destroyed, except upon the clearest terms to that effect contained in the limitation over. Here the limitation over in favour of the Defendants is so imperfectly expressed, that it is impossible to say whether the mistake, if there be any mistake, is in the terms of the limitation over; or whether, if the testator's attention had been called to the circumstance, he would not have said, that the mistake existed in the antecedent gift; and, therefore, it is proper to hold that the person who takes under the antecedent gift is not to be deprived of his estate except upon the happening of the exact event upon which he was to be deprived of it, according to the strict interpretation of the limitation over.

The case is still stronger when it is considered that here the limitation over is contained not in the will itself but in a codicil. In *Doe dem. Hearle v. Hicks*(b), the House of Lords laid down the rule, that, where there is a clear devise in a will, and then in a codicil a limitation tending

(a) 4 D. M. G. 73.

(b) 1 Cl. & F. 20.

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strongly to displace the previous devise contained in the will, the codicil being a subsequent instrument, the onus is upon those who claim under it to show that the intention to displace the devise is equally clear with the original intention to devise; "for, if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought, undoubtedly, to stand" (a). And, although, in that case, the codicil contained strong words in favour of the contention that the will was revoked, yet, inasmuch as the intention to revoke was not equally clear with the intention to devise, the House of Lords held, that the devise must stand.

Now, in this case, the contention of the Defendants who claim under the codicil is nothing short of this, that, after the words "should both my children die in their minority," I am to introduce the words "or previously to the division of my property, as directed by my will." It is impossible to say that both the children have died in their minority, when one had attained twenty-one before she died; the only possible mode, therefore, by which the Defendants' contention can be sustained, is by introducing words to the effect I have mentioned. And I am asked to introduce these words, in the face of two clauses in the will, in which the testator has carefully distinguished the periods; for, when he makes provision for the support of his children and their education during their minority, he adds the words "*or the minority of either of them.*" And, again, when he speaks of their pocket-money, he says, "*during their minority, or until such division of the property is made as above described.*"

Even assuming the interests under the will to be vested

(a) 1 Cl. & F. 24, 25.

interests, there is considerable obscurity in the will as to what would have happened with regard to the share originally given to the wife if she had died before the period when the property was directed to be divided,—whether that share would be included in the limitation over in the will from the eldest daughter to her sister, in the event of the eldest dying after attaining twenty-one but without leaving issue. And if there is any uncertainty on that point, it would be an additional argument for saying, upon the reason of the thing, irrespective of any consideration as to the strict construction of the words, that such a share would not be divested if either daughter attained twenty-one; for it is plain that the Court would struggle against any construction which would deprive a child who has attained twenty-one,—and who might be minded to dispose of her property, either by settlement or otherwise,—of any fragment of interest she could possibly acquire. Therefore, even taking the interests under the will to be vested interests, it is by no means clear, to my mind, that the testator had no reason for wording the codicil in the manner he has done. But even if he had none, I am still driven to the question, whether, after that clause in the codicil, I can introduce the words for which the Defendants contend, unless it be upon a clear conviction that there is a mistake in the codicil, and no mistake in the will.

As regards the second argument on the part of the Defendants,—viz. that, according to the true construction of the codicil, the word “minority” must mean the period during which the testator has kept both his children out of the full control over their property,—the only case cited, that of *Milroy v. Milroy*(a), was decided upon the whole frame and scope of the will. If the whole tenor of the will be such as clearly indicates that the word “minority” is used in such a sense, the Court can let the testator be

1858.

MADDISON

v.

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Judgment.

(a) 14 Sim. 48.

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the expounder of his own words. He frames his own vocabulary; and if he uses the word in that sense, the Court is at liberty to adopt it. But in this case, I find the testator making a careful separation between the period of minority and that of full age. In one case I find him providing for the maintenance and education of his children "during their minority, or the minority of either of them." In another, that the allowance for pocket-money shall continue "during their minority, or until such division of the property is made," as he had before described. And, looking to these circumstances, I do not feel at liberty to give to the word "minority," when it occurs in the codicil, any other than its strict interpretation, viz. "under twenty-one years of age."

I therefore hold, that, whether the interests taken by the testator's daughters were vested interests or not, the gift contained in the codicil has failed, the event upon which it was made to depend not having happened. No one can take anything under the codicil.

What interest the Plaintiffs took, independently of the codicil, is a question which cannot be determined without an inquiry whether the eldest daughter left a will.

Minute of
 Decree.

DECLARE, that the gift over under the codicil has failed. Inquire, without prejudice to any question in the cause, whether the elder daughter made a will. Inquire whether, at the death of the testator, any and what real estate was vested in him as trustee for his wife, the Defendant *Eve Chapman*. Reserve further consideration.

1859.
 January.
 FULL COURT
 OF APPEAL.

The foregoing decision was affirmed on appeal by the LORD CHANCELLOR (Lord *Chelmsford*) and the LORDS JUSTICES.

1858.

LEYCESTER v. LOGAN.

July 30th.

IN 1856, a collision took place between the ship *Falcon*, of which the Plaintiffs were the registered owners, and *The Imogene*, in consequence of which the latter foundered and was lost. The Plaintiffs then filed their bill, under the 514th section of the Merchant Shipping Act, 1854(a), to have the value of *The Falcon* and her freight ascertained and apportioned, pursuant to the Act; and by the decree made at the hearing of the cause(b), the Defendant *Logan* was to be at liberty to sell the ship, under a judgment which he had obtained in the Court of Admiralty.

The ship and freight were afterwards sold, and produced a gross sum, amounting to 12,749*l.* 4*s.* 9*d.*

The cause now coming on for further consideration a question arose, whether the Plaintiffs were chargeable under the Act with the gross proceeds of the sale, or whether they were entitled to deduct therefrom a sum of 363*l.* 2*s.* 4*d.*, being the amount of the disbursements and fees retained by the Admiralty Commissioners upon the sale of the ship.

Mr. *Baggallay*, for the Plaintiffs, contended that they ought not to be charged with more than the net proceeds of the ship and freight, after deducting the 363*l.* 2*s.* 4*d.* The "value" of the ship, within the meaning of the Act, was what the ship would produce to her owners after deducting the costs of sale. The intention of the legislature was, that

Merchant Shipping Act, 1854, Part ix.—17 & 18 Vict. c. 104, s. 504—Value of Ship—Costs of Sale.

The value of a ship, within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 504), is, what she would have fetched if sold immediately before the collision, without deduction in respect of costs of sale.

Therefore, when a ship had run down another and was afterwards sold, and her owners claimed the benefit of the Act,—*Held*, that they were accountable for the gross proceeds of the sale, without deduction in respect of disbursements and fees retained by the Admiralty Commissioners.

Argument.

(a) 17 & 18 Vict. c. 104.

(b) Reported 3 K. & J. 446.

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 LOGAN.
 —
Argument.

ship-owners, upon giving up their ship and freight, were to be under no further liability; and had their ship been so given up, the Defendants must have borne the expenses of the sale.

Mr. *Rolt*, Q. C., and Mr. *Cole*, for the Defendant *Logan*, and Mr. *Druce* for other Defendants interested in *The Imogene* or her cargo, contended that the Plaintiffs should be charged with the amount of the gross proceeds of the sale, without any deduction.

The value of the ship, according to the Act, was her value at the moment before the collision: *Dobree v. Schröder*(a), *African Steam Ship Company v. Swanzy*(b). And where the ship that has done the damage is afterwards brought home and sold, her value is the amount of what she actually fetches, plus a sum representing the subsequent deterioration in her value. If the costs in question were deducted, the Plaintiffs, upon the same principle, might throw upon the Defendants the expenses of bringing *The Falcon* home.

Mr. *Baggally*, in reply, did not dispute the allowance for deterioration.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The value of a ship is what a purchaser is willing to give for her. That is to him the value of the ship. Here the ship and freight together have fetched the gross sum of 12,749*l.* 4*s.* 9*d.*, and that sum the Plaintiffs must pay, without any deduction in respect of the disbursements and fees incidental to the sale.

(a) 2 My. & Cr. 489.

(b) 2 K. & J. 660.

1858.

PRICE'S PATENT CANDLE COMPANY (LIMITED)

July 18th.

v.

BAUWEN'S PATENT CANDLE COMPANY
(LIMITED).

THE Plaintiffs claimed to be the patentees of four inventions for the manufacture of candles, and for the preparation of fatty and oily matters and substances for that purpose, according to certain specifications.

*Account—
Injunction—
Infringement of
Patent.*

The rule in patent cases, that this Court cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that, since an interim injunction was moved for, the Defendants have sold articles which, had the facts and law been then sufficiently ascertained, the Court would have restrained them from selling.

On the 28th of November, 1856, the Plaintiffs filed their bill for an injunction to restrain the Defendants from infringing their several patents; and praying, also, an account of the quantities of fatty and oily matters and substances which had been treated and operated upon by the Defendants in using any of the Plaintiffs' alleged patent inventions; and of all candles manufactured and sold by them, in the manufacture or production whereof, or of the materials or substances used therein, the arts and processes or modes of manufacture, the subject of the Plaintiffs' inventions or any of them, had been used by the Defendants; and of the gains and profits which the Defendants had made thereby.

On the 3rd of December, 1856, the Plaintiffs gave notice of motion for an interim injunction for the 10th of that month.

On the 8th of December, 1856, the Plaintiffs' first patent expired.

On the 10th of December, 1856, the motion was heard by the Vice-Chancellor, who ordered it to stand over until

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the hearing, the Plaintiffs undertaking to bring actions; the costs to be costs in the cause.

Actions were tried between the parties, and resulted in a verdict for the Plaintiffs upon the first patent, and in verdicts for the Defendants upon the second, third, and fourth patents.

The cause now came on to be heard.

It was admitted at the bar, that, down to the 8th of December, 1856, when the first patent expired, the Defendants continued to carry on the process of which the Plaintiffs complained as an invasion of that patent. But it was denied that the Defendants had now in their possession any of the candles, matters, or substances, of which the bill sought to have an account taken.

Argument.

Mr. *Fooks* and Mr. *Webster*, for the Plaintiffs, contended, that, as to the first patent, they were entitled to an account: when that patent expired the Defendants' works were in full operation, and it was impossible to suppose that they could have sold all their stock during the two days which intervened before the motion was heard.

[They cited *Crossley v. Beverley* (a), and *Mawman v. Tegg* (b).]

Mr. *Hobhouse* for the Defendants, the company :—

It is now eighteen months since the Plaintiffs' patent expired, and the Defendants have not a single article left of which the bill seeks to restrain them from disposing.

(a) 1 R. & M. 166, n.; S. C., Webster's Patent Cases, 119.

(b) 2 Russ. 385.

The VICE-CHANCELLOR.—But they must have had when the bill was filed.

Mr. *Hobhouse*.—No doubt; and down to the 8th of December, when the patent expired. But everything has since been disposed of, otherwise it would have perished from natural causes. And the rule is, that, if at the hearing a Plaintiff is not entitled to an injunction, he can have no right to an account, which, from the extreme difficulty of taking it, the Court never grants, unless it be the absolute right of the Plaintiff: *Baily v. Taylor* (a), *Smith v. The London and South Western Railway Company* (b). The only exception is, where, as in *Crossley v. Beverley* (c), there has been a fraudulent concealment of the manufacture, with a view to throw the manufactured articles upon the market, so soon as the Plaintiff's patent expired (d).

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PRICE'S
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Mr. *H. R. Farrer* appeared for other Defendants in the same interest.

Mr. *Fooks*, in reply, contended that this was, in effect, the hearing of the motion; the Court would try the question as if it were the 10th of December, 1856, when the motion was made; and it was now apparent, though not then in evidence, that at that date the Defendants were in possession of a stock of articles, which, had the facts and law been then before the Court, they would have been restrained from selling. If an injunction could have been granted then, it was hard if the Court could not grant an account now.

(a) 1 Russ. & My. 73.

(b) Kay, 408.

(c) 1 Russ. & My. 166, n.;

S. C., Webster's Reports of Patent Cases, 119.

(d) Kay, 415, 416.

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PRICE'S
PATENT
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PATENT
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Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

As regards the first of the Plaintiffs' patents, I find no small difficulty in granting them a decree for an account.

I must adhere to the observations I made in *Smith v. The London and South Western Railway Company*(a), as to the right to an account being dependant mainly upon the right to an injunction, so that if for any reason an injunction cannot be obtained, there can be no right to an account;—a rule for which there is good reason, since the questions involved in taking accounts of the particular instances in which patents have been infringed, and of the profits thereby made, are questions of great nicety and difficulty, and never tend to any satisfactory result. Lord Cottenham's observations in *Crossley v. The Derby Gas-Light Company*(b), show the great difficulty which must arise in taking accounts of this nature, and how reluctant the Court should be to assume this species of jurisdiction, where it is not the right of the suitor to call for its exercise.

Then, as regards the Plaintiffs' right to an injunction, it is now very properly admitted, that, down to the 8th of December, 1856, when the patent expired, the process of infringement was going on. Articles of which the bill seeks an account, must, at that time, have been in the possession of the Defendants, and could not be manufactured into candles, much less sold, during the two days which intervened before the 10th of December, when the motion for an injunction was heard. On the 10th of December, therefore, a stock of these articles must have been still in the Defendants' possession; and that being so, it follows, that, had I then been clear as to the question of right which has since been established at law,—or, rather, had that question

(a) Kay, 408.

(b) My. & Cr. 434 & seq.

been then established at law as it has since been,—the Plaintiffs would have been entitled to an injunction. But it does not by any means follow, that, because the Plaintiffs would *then* have been entitled to an injunction, if all the facts and the law had been so clearly ascertained as to authorise the interference of the Court, therefore, they are *now* entitled to the same relief, at a time when it may well be that an injunction would be utterly useless, in consequence of there being nothing left upon which it could operate. It is the misfortune of the Plaintiffs, that, when they made their interlocutory application, their case was not established with sufficient clearness to enable them to obtain an interim injunction. And if the stock of goods, which they might then have restrained the Defendants from selling, has since been sold, there being nothing at the hearing for the Court to restrain the Defendants from selling, the Court cannot proceed to give further relief by way of account.

The question, therefore, seems to resolve itself into this : whether, in the absence of any further information on the subject, I can assume that the entire stock has been sold, and that nothing remains of that stock of goods of which the Defendants were in possession when the interlocutory application was made, now a year and a half ago. It seems to me, that, if the Plaintiffs wish for an inquiry on that subject, it should be granted ; but I am afraid it would be useless.

It is an unfortunate position for the Plaintiffs, but the misfortune arises from their delay in not filing the bill until their patent had almost expired. Their patent is gone ; and whatever may now appear, *ex post facto*, to have been their rights when they applied for the interlocutory injunction, if, at the hearing, there is nothing upon which an injunction can operate, the arm of the Court is stayed,

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PATENT
CANDLE CO.
Judgment.

and I am bound by the authorities to say, that, there being at the hearing nothing to which the jurisdiction of equity can attach, the case is reduced to damages, and the bill must be out of Court.

The result is this, that, as regards the first patent, if an inquiry is asked, there must be an inquiry whether there are now remaining unsold any fatty or oily matters and substances which were treated and operated upon by the Defendants in using that invention prior to the 8th of December, 1856, or any candles manufactured as mentioned in the prayer of the bill before that date. I must give the Plaintiffs the benefit of the jurisdiction, if there is anything upon which the injunction could operate. In the meantime, the Defendants must undertake not to dispose of such articles, if any. If it shall appear that there are any of such articles remaining, I must reserve further consideration. It is unfortunate, but I cannot make a prospective order. If it shall appear that there is nothing remaining, I can only dismiss the bill; since, in that case, I shall have nothing to operate upon by way of injunction. I strongly adhere to the decisions upon that point. If no inquiry is asked, the bill will also be dismissed. But if the bill is dismissed, it will be without costs. I certainly should not think of giving costs in such a case.

The original motion, of which the costs were made costs in the cause, will follow exactly the same course. It is a little hard upon the Plaintiffs, for if I had known the facts then, as I know them now, I should have found something then existing upon which an injunction could have operated.

As regards the second, third, and fourth patents, the bill will be dismissed with costs.

1858.

AUSTRALIAN AUXILIARY STEAM CLIPPER
COMPANY (LIMITED)

June 29th.

. v.
MOUNSEY AND OTHERS.

THE Plaintiffs were a joint stock company with limited liability, established and incorporated pursuant to the Joint Stock Companies Act, 1856, and were now in course of being wound up voluntarily.

*Shipping Com-
pany (limited)*
—*Directors*—
*Power of, to
mortgage Ships*
—19 & 20 Vict.
c. 47.

The 3rd clause of the memorandum of association of the Plaintiffs' company was as follows:—"The objects for which the company is established are to purchase a number of vessels, and to run them between *England* and *Australia*, or between any other countries or places that may be deemed desirable, or to let out the same for hire, and generally to transact the business of shipowners."

Directors of a shipping company, with limited liability, having power by the company's articles of association to do all such acts as the company might do, not being acts which the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), or the company's articles of association required to be done by the company in general meeting, have power to borrow money for the purposes of the company by mortgaging the company's ships.

By the Plaintiffs' articles of association it was provided, that the regulations for the management of a company, contained in table B. in the schedule to the Joint Stock Companies Act, 1856, should not apply; and that, in their stead, others should be substituted, by one of which it was declared, that the company might, with the sanction of the company, previously given in general meeting, increase its capital. Another of the regulations so substituted (the 55th) was as follows:—"The business of the company, and all matters relating to the company and the affairs thereof, shall be controlled, managed, and regulated by the directors, who may from time to time appoint and remove such manager, secretary, clerks, and other officers and servants of the company, at such salaries and with such powers and

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 &C.
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 —
Statement.

duties as the directors shall think fit, and may appoint and remove the solicitors, bankers, and brokers of the company, and may exercise and do all such powers, discretions, acts, deeds, and things which the company might exercise and do, as are not by the 'Joint Stock Companies Act, 1856,' or by these articles declared to be exercisable or done by the company in general meeting, subject nevertheless to the regulations of these articles, to the provisions of the 'Joint Stock Companies Act, 1856,' and to such regulations (being not inconsistent with the aforesaid regulations or provisions) as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors, which would have been valid if such regulation had not been made."

On the 4th of August, 1857, at an extraordinary general meeting of the company, duly held for that purpose, the following special resolution was duly passed:—"That the company be empowered, by the issue of debentures, to raise such sum of money as it may require, not exceeding in whole 50,000*l.*, and be authorised to assign the company's vessels to trustees to secure the due payment of the principal and interest to be secured thereby."

This resolution was subsequently confirmed at another general meeting of the Plaintiffs' company.

The bill stated the foregoing facts, and then charged that neither the company nor the directors ever issued any debentures, or mortgaged their vessels or any of them, pursuant to the special resolution, or otherwise acted upon that resolution; but the directors improperly, and without authority, affixed the company's seal to two instruments, dated August, 1857, purporting to be a mortgage, with power of sale, of *The Istamboul*, one of the Plaintiffs'

vessels, to the Defendant *Mounsey*, as trustee for the *Northumberland and Durham Banking Company*, for securing 25,000*l.*, of which 17,000*l.* was then already due to the bank from the Plaintiffs in respect of bills of exchange accepted by the Plaintiffs, and the rest was paid by the bank to or by the order of the directors of the Plaintiffs' company.

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The bill stated, that, previously to the execution of the instruments of October, 1857, the directors of the Plaintiffs' company had improperly, and without authority, affixed the company's seal to certain other instruments, purporting to be mortgages of other three ships of the company (being all which the Plaintiffs possessed) for securing balances due from the company. And it charged, that, when the seal of the company was affixed to the instruments of October, 1857, the Defendants had notice of that circumstance.

The bill prayed, that it might be declared that the seal of the company had been affixed to the instruments of October, 1857, improperly, and without any sufficient authority; and that orders might be given for the delivery up of those instruments, and for vesting the *Istamboul* in the Plaintiffs, and enabling them to dispose of the vessel, and receive the freight and earnings, freed from the mortgages thereby created. It also prayed for an injunction, upon the footing of the above declaration(a).

The Defendants, the banking company, demurred generally for want of equity.

Mr. *James*, Q.C., and Mr. *Giffard*, in support of the demurrer:—

Argument.

(a) It was arranged at the hearing that the 4th paragraph of the prayer, which prayed that the Plaintiffs might be at liberty to redeem the vessel, should be taken as struck out of the bill.

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 &c.
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 MOUNSEY.
 ———
Argument.

The question is, simply, whether the directors had power to borrow money upon a mortgage of one of the company's ships; and it is clear that they had. The 55th clause of the articles of association provides, that the directors may do all acts which the company might do, and which are not required by the Joint Stock Companies Act, 1856, or by the articles themselves, to be done by the company in general meeting. Borrowing money upon such a mortgage was not an act for which a general meeting was required, and it was clearly an act which the company might have done. The mortgage was a contract under the common seal of the company, made on the company's behalf, by persons acting under the implied authority of the company; and, by the 41st section of the Joint Stock Companies Act, 1856, it is enacted, that all contracts so made shall be effectual in law, and shall be binding upon the company and their successors. So far from the Act excluding mortgages from the contracts which may be concluded on behalf of companies incorporated under its provisions, the 44th section contains express directions as to how mortgages are to be made.

The powers given by the resolution of August, 1857, were merely cumulative.

Mr. *Rolt*, Q. C., and Mr. *Bagshawe*, jun., in support of the bill:—

First, the directors had no power to raise money by mortgaging the company's ships; for such an act was not within the powers of a general meeting of the company. The Joint Stock Companies Act, 1856, contains nothing to alter the ordinary law of partnership on this subject; and by that law, although one partner may bind another by a bill of exchange, yet, when a deed is required (and by the Merchant Shipping Act, 1854(a), a deed would be required

(a) 17 & 18 Vict. c. 104.

in order to effect a mortgage of a ship), no partner, or majority of the partners, can bind the firm. And here, from the very nature and objects of this company, it stands to reason that such an act could never have been contemplated. The company was established for the purpose of making profit, not by buying and selling ships, but by sailing them. The ships were the instruments by which that trade was to be carried on. The company owned them solely to enable them to carry on that trade; and it is impossible that any one partner or majority of partners could do an act which would bring the entire business of the company to an end. Suppose a firm of four partners, registered owners of a ship, and that two have the fullest power to do all acts requisite for carrying on the business of the firm, that business being to trade by means of the ship, they could not do an act which would necessarily deprive the firm of the power of carrying on their trade. Their powers are to do all such acts as shall be necessary to enable the firm to *carry on*, not to *stop*, their trade.

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 &c.
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 —
Argument.

But, secondly, assuming that a majority of the company had such a power, and that such a power was ever delegated to the directors, it was, in fact, revoked by the resolution of August, 1857. It is impossible to contend that the powers given by that resolution were merely cumulative. The object of the resolution was, to limit the amount to be raised by the directors under their previous powers, whatever they might be; and, after it was passed, it was impossible for the directors to exercise their previous powers, except in the modified form prescribed by that resolution.

The VICE-CHANCELLOR.—The bill does not aver that the money was not wanted for the purposes of the company.

Mr. *Rolt*.—But it avers what is equivalent, viz. that the

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company has four ships, and no more; and that all those ships have been mortgaged. If this had been an ordinary company with unlimited liability, the directors might have had some pretext for what they have done. But, in the case of a limited company, they were bound to stop, before such a step was necessary.

[The following cases were also referred to : *The Official Manager of the Athenæum Life Insurance Society v. Pooley*(a), *Ex parte The Worcester Corn Exchange Company*(b), *In re The Sea Fire and Life Assurance Company*, *Greenwood's case*(c), and *Ernest v. Nicholls*(d).]

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It is clear to me that this demurrer must be allowed.

The question is, what were the powers of the directors of the Plaintiffs' company under their memorandum and articles of association.

Now, the third clause of the memorandum of association declares, that the objects for which the company is established are, to purchase a number of vessels, to run them between *England* and *Australia*, or between any other countries or places that may be deemed desirable, or to let out the same for hire, and generally to transact the business of shipowners.

The 55th clause of the articles of association provides,

(a) 4 Jur., N. S., 371.

(b) 3 D. M. G. 180.

(c) Id. 459.

(d) 6 H. L. C. 401.

that the business of the company, and all matters relating to the company and the affairs thereof, shall be controlled, managed, and regulated by the directors, who (among other things there specified) "may exercise and do all such powers, discretions, acts, deeds, and things, which the company might exercise and do, as are not by the Joint Stock Companies Act, 1856, or by these articles declared to be exercisable or done by the company in general meeting; subject, nevertheless, to the regulations in these articles, to the provisions of the Joint Stock Companies Act, 1856, and to such regulations (being not inconsistent with the aforesaid regulations or provisions) as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

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 —
Judgment.

Now, it is plain from that clause, that the directors are empowered to do everything which the company itself might do, and which is not required either by the Joint Stock Companies Act, or by the articles of association of the company, to be done by a general meeting of the shareholders.

The question, therefore, resolves itself into this simple form:—Whether, except for this transfer of their powers under the articles of association, this company could not raise, by mortgage of their ships, the money required for the purposes of their business.

The act complained of is simply, that, the company having already mortgaged all their ships but one, and being in want of a further sum of money for the purposes of their business, the directors apply to the bankers, who are already creditors of the company, to advance the requisite sum; and finding that the bankers require security as well for their

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past as for future advances, they make a mortgage to a trustee for the bank of one of the company's ships.

Without relying upon the word "deed," which, it may be argued, is not to be construed in the 55th clause in its technical sense of an instrument under seal, the question is, whether the act I have described was an act which the company might have done, and which neither the Joint Stock Companies Act, 1856, nor the Plaintiffs' articles of association, required to be done by the company in general meeting.

It was argued, that it was not such an act; first, because, in any partnership, a majority of the partners would have no power to bind a minority by executing a deed; that, the moment a deed under seal is required, the power of a majority is at an end. But that argument overlooks this most important distinction, that, in an ordinary partnership firm, the firm is not a body corporate; in the present case the Plaintiffs' company are a body corporate. The question to be determined is, what are the powers of such a body? And it is clear that a majority of the members of a body corporate must have powers of this description, because, except through the medium of a majority, no incorporated company can act. I am not now considering the powers of a majority of a body corporate to effect a dissolution; that is a matter not falling within the scope of the corporate business. This is an act clearly falling within the scope of the corporate business, and is one which the company must clearly have the power to do. Otherwise, if a ship were once upon the register, it might be impossible to get her off; she might rot before it would be possible for the company to sell or exchange her.

It was said, that, looking to the objects for which the Plaintiffs' company was established, the act complained of

could not be said to fall within the scope of the corporate business, the business of this company being to make profit, not by trafficking in the sale of ships, but by sailing them; and that, the ships being the instruments with which they carry on their trade as a company, to mortgage them, so far from falling within the corporate business, would be fatal to the very objects for which they were established. But I cannot conceive that a shipping company, having eight vessels for the purpose of carrying on a business like this, if they have occasion to buy a ninth, are precluded upon any ground of this description from mortgaging one of the eight for that purpose.

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—
Judgment.

If then this company had this power, the question, except as to the argument founded upon the special resolution of August, 1857, is at an end. I find no clause in the articles of association directing how money is to be raised for carrying on the business of the company. Yet every concern of this description requires money, from time to time, for the purpose of carrying it on. And nothing being specified as to borrowing, the measures to be adopted for that purpose are precisely those which it would fall within the province of the directors to take, until checked by some regulation of the company in general meeting, as prescribed by the 55th clause of the articles of association.

Then, as regards the special resolution of August, 1857, the bill avers, that, in August, 1857, at an extraordinary general meeting of the company duly held for that purpose, the following special resolution was duly passed:—"That the company be empowered, by the issue of debentures, to raise such sum of money as it may require, not exceeding in the whole 50,000*l.*, and be authorised to assign the company's vessels to trustees to secure the due payment of the principal and interest to be secured thereby." But unless that clause strictly prohibits the directors from borrowing money, and

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Judgment.

making a mortgage for that purpose, in the manner they have done, all that it can mean is this:—"Whereas, you, the directors, have already these general powers of borrowing money, and assigning the company's vessels for that purpose, we now point out to you a particular way as to which there might be some question, whether you" (nay, more, there might be a question whether even the company) "would have a power of borrowing." That would be a very natural resolution to pass (assuming the meeting to have had the power of passing it); for clearly no prudent director would ever have thought of issuing debentures as there mentioned, without the authority of such a resolution. And the question, therefore, comes to this: whether, because directors require a special power for such an extraordinary transaction as that of borrowing money on behalf of the company by means of debentures, therefore they require a special power for such an ordinary transaction as that of borrowing money by the means which these directors have adopted.

It appears to me, that the directors were at liberty to raise the money in question in the manner they have done, until arrested by some regulation prescribed by the company in general meeting. There is no allegation of fraud, nor any allegation that the money which has been secured was not wanted for the purposes of the company. The demurrer, therefore, must be allowed.

1858.

BRISTOW v. WHITMORE.

May 4th & 27th.

IN 1856 the Plaintiff, the master of the ship *Kenilworth*, of which one *Towse* was the sole owner, concluded two charterparties with the Commissioners of the Admiralty, for the conveyance of troops by his ship from the *Mauritius*, and from the *Cape of Good Hope* to *Gravesend*, and thereby agreed to supply them, while on board, with provisions, and to put up at the expense of the ship such fittings, berths, and other articles as might be required for their use.

In supplying provisions and putting up fittings, as required by these charterparties, the Plaintiff incurred expenses, which he defrayed partly out of his own moneys, and partly by means of bills drawn on the owner.

The Plaintiff performed his part of the contract; but, shortly after his arrival in *England*, *Towse*, the owner of the ship, was adjudicated bankrupt, the bills drawn on him by the Plaintiff were dishonoured, and conflicting claims, to the amount of the ship's earnings, were advanced, as well on the part of the assignees in bankruptcy, as also by the Defendants *Robinson* and *Fleming*, who claimed under a mortgage made by *Towse* previously to his bankruptcy.

The Commissioners of the Admiralty having refused to pay the amounts in question until the right thereto should be determined by some competent tribunal, the Plaintiff now filed his bill against the assignees in bankruptcy of *Towse*, and against *Robinson* and *Fleming*, praying, (1.) A declaration that he was entitled to be repaid out of the moneys due from the Commissioners of the Admiralty

Jurisdiction—
15 & 16 Vict.
c. 86, s. 50—
Declaratory
Order.

This Court has no jurisdiction, either under the 50th section of the Act 15 & 16 Vict. c. 86, or otherwise, to make a declaration of right, unless it be one upon which the Court could act, if required, by granting consequential relief.

Where the declaration sought is not of that nature, the Court has no jurisdiction to entertain the suit.

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 BRISTOW
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 —
Statement.

the sums so paid by him as aforesaid, and to be indemnified out of the same moneys against all claims and demands on account of the bills.—(2.) That such indemnity might be made available for his protection in such manner as to the Court should seem fit ; and (3.) for further relief.

The cause now coming on to be heard,

Argument.

Mr. *Amphlett*, Q.C., and Mr. *E. Macnaghten*, for the Defendants *Robinson* and *Fleming*, took a preliminary objection, that the Court had no jurisdiction to entertain the suit. Not only did the bill omit to ask any specific relief, but the circumstances of the case were such that no relief could have been granted, even if it had been asked, the question between the parties being a merely legal question : and to such a case the power given to the Court by the 50th section of the Act, 15 & 16 Vict. c. 86, to make binding declarations of right without granting consequential relief, had no application : *Rooke v. Lord Kensington*(a), *Jackson v. Turnley*(b).

Mr. *Rolt*, Q.C., and Mr. *Baggallay*, for the Plaintiff, contended, that, in the 2nd paragraph of the prayer, the Plaintiff had asked specific relief, which the Court could grant by way of injunction, restraining the payment of the moneys in question, except in conformity with the declaration prayed in the preceding paragraph. They relied also upon the large wording of the 50th section of the Act, that “no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby ; and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.”

(a) 2 K. & J. 753.

(b) 1 Drew. 617.

[The main question in the suit was then argued *de bene esse*.]

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WHITMORE.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I feel great difficulty in determining the principal question between the parties, having regard to the objection taken by the Defendants' counsel as to the want of jurisdiction.

The recent Act (15 & 16 Vict. c. 86) uses comprehensive words, and has given large powers to the Court in reference to making binding declarations of right, without granting consequential relief; but the Court has no power, either under that Act or otherwise, to make a declaration of right, unless it be one upon which the Court could act, if required, by granting consequential relief. Where such a declaration is sought, consequential relief may be waived; and the Court is empowered, by the 50th section, to make a declaration alone without granting relief. But, where the declaration sought is not of that nature, the Court has no jurisdiction to entertain the suit.

It was argued, that, in this case, the declaration asked was one upon which the Court could give relief by way of injunction; but the answer is, that the right which the Plaintiff claims is a legal right, and nothing has been done by the Defendants, or by the Commissioners of the Admiralty, to prevent him from asserting that right. This Court cannot declare an equitable right on behalf of the legal owners.

Mr. Baggallay.—Not in a case where that right cannot be enforced at law?

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The VICE-CHANCELLOR.—But it *can* be enforced at law by petition of right. It is that which causes the difficulty.

If the Commissioners of the Admiralty would pay the fund into Court, then I could act; but if they decline, I have no jurisdiction.

The cause may stand over, if the Plaintiff desires it, to ascertain whether the Commissioners of the Admiralty will take that course. Otherwise the bill must be dismissed.

On a subsequent day, the Commissioners of the Admiralty having consented to pay the fund into Court with the leave of the Court, the cause was ordered to stand over, with liberty for them to make that payment.

Dec. 21st.

On the 21st of December, the fund having been paid into Court by the Commissioners of the Admiralty, the Vice-Chancellor, at the request of the Plaintiff's counsel, delivered his judgment upon the main question in the suit; and by the decree then made it was declared, that the Plaintiff was entitled to be indemnified in respect of all expenses incurred by him under the charterparties in the bill mentioned, in supplying provisions, and putting up fittings, berths, and other articles, as required by such charterparties respectively.

A full report of the latter judgment will appear in a subsequent volume, the case, in this respect, being one of first impression.

1857.

WELCH v. KNOTT.

Dec. 22nd.

THE Plaintiffs carried on the trade of manufacturers and vendors of soda water and other aerated and mineral waters, under the firm of *Jacob Schweppe & Co.*, at No. 51, *Berners-street, Oxford-street*.

The Plaintiffs sold their soda water in bottles, with the words "*J. Schweppe & Co., 51, Berners-street, Oxford-street, Genuine Superior Aerated Waters*" stamped or impressed upon them in the manufacture, and having pasted over the corks coloured labels, bearing a certain form of signature, consisting of the words "*J. Schweppe & Co.* By special appointment," with the form of a crown and other special marks, constituting their trade mark.

The bill averred, that the Defendant had sold soda water in bottles stamped and impressed in the manufacture with similar words and figures to those stamped or impressed on the bottles used by the Plaintiffs, and having pasted over the cork of each a paper label of a similar colour to those used by the Plaintiffs, having printed thereon, in lieu of the signature *J. Schweppe & Co. &c.*, the words "Soda Water" in characters similar to those in which the signature was printed on the Plaintiffs' label and having a similar crown printed on the top to that printed on the Plaintiffs' label, such label being a colourable imitation of the Plaintiffs' label, and so printed and contrived as to deceive the eye, except upon close inspection.

The Plaintiffs' solicitor, Mr. *Chapple*, deposed by his affidavit, that, on the 21st of September, he "proceeded to the place of business of the Defendant, and then and there

*Trade Mark—
Injunction.*

Injunction to restrain the sale in bottles stamped with Plaintiffs' name and address, followed by the words "genuine superior aerated waters," of soda water not manufactured by Plaintiff, dissolved—the Court being of opinion, upon the evidence, that Defendant was not shown to have used the bottles either with an intention, or so as in fact, to mislead the public.

But the user of such bottles, so as in fact to mislead the public, although unintentionally, would be restrained:—*Obiter.*

Whether or not the onus was thrown upon Defendant of informing the public that it was not Plaintiffs' soda water he was selling—*Quere.*

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purchased a dozen bottles of soda water from a shopman of the Defendant; and on five of the bottles in such dozen were stamped and impressed in the manufacture the same words and figures to those stamped and impressed on the bottles so used by the Plaintiffs, and over the cork of each of the said twelve bottles was pasted a paper label of a similar colour to those so used by the Plaintiffs as aforesaid." He identified a bottle made an exhibit as one of the bottles so purchased.

The other averments in the bill in reference to the labels used by the Defendant were not supported by the evidence.

On the 13th of October the Plaintiffs obtained an *ex parte* injunction, restraining the Defendant from using or permitting to be used in his trade or business, or selling or permitting to be sold, soda water in bottles similar to those so in use by the Plaintiffs, as in the bill mentioned, having the words and figures "*J. Schweppe & Co., 51, Berners-street, Oxford-street. Genuine Superior Aerated Waters,*" or similar words and figures stamped or impressed thereon; and from using or permitting to be used in his said trade or business, or selling or permitting to be sold, soda water in bottles having labels pasted over the corks thereof or affixed thereon similar to those used by the Plaintiffs, as in the bill mentioned, or merely colourably differing therefrom or being an imitation thereof.

The Defendant by his answer stated, that he had occasionally purchased lots of second-hand soda water bottles, amongst which there had been bottles with the names of different firms, including that of *J. Schweppe & Co.* moulded thereon; and that it was the custom of the trade on selling bottles of soda water to take in return for the bottles sold an equal number of similar bottles, without regard to what names might be moulded thereon; also, that he believed

the said bottles mentioned in *Chapple's* affidavit were bottles originally manufactured for the use of the Plaintiffs and sold by them to the public.

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v.
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The answer also set out letters written by the Defendant to the Plaintiffs since the injunction was obtained, in which the Defendant had stated, that, if, in doing as he had done, he had erred, it was inadvertently; and that, understanding now the Plaintiffs' wish not to have their marked bottles so employed, he should not allow it for the future, and would give the Plaintiffs a legal guarantee to insure this object without further proceeding.

Mr. Rolt, Q. C., and Mr. Shapter, for the Defendant, now moved to dissolve the injunction.

Argument.

Mr. Cairns, Q. C., and Mr. Roxburgh, for the Plaintiffs, contended, that the evidence showed a fraudulent user by the Defendant of the Plaintiffs' bottles, with the intention of misleading the public into the belief that the soda water sold therein was manufactured by the Plaintiffs; at all events, it showed a user by which the public would, in fact, be misled into that belief, whether intentionally or not on the part of the Defendant. And in either case, the injunction should be continued; for, according to *Millington v. Fox(a)*, to entitle the Plaintiff to an injunction, intentional deception need not be proved.

The Defendant's label, unlike that used by other traders in soda water, had no name, and was simply marked "soda water." Taking, therefore, the labels and the bottles together, the inscription ran "Soda Water, *J. Schweppe & Co., &c.*", amounting in effect to a deliberate statement,

(a) 3 My. & Cr. 338, 352.

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that it was the Plaintiffs' manufacture. The Defendant had ten dozen of these bottles, which, upon his affidavit, he must be taken to have purchased—not taken in exchange—purchased, that is, designedly with a view to selling in them his own soda water.

The VICE-CHANCELLOR.—It is not an unimportant circumstance in reference to the question of intentional deception, that, out of the dozen bottles he is proved to have sold, seven were plain, and only five stamped with the Plaintiffs' name.

Mr. Cairns.—But if that were admitted as a defence, it would enable anyone to violate a trade mark simply by inserting into every dozen articles sold a certain proportion of an unobjectionable kind. Besides, the stamped bottles might be retailed to the public separately.

The VICE-CHANCELLOR.—You claim the exclusive right to the use of these bottles for all aerated waters. Now the bottles, by their form, are not adapted for any but aerated waters; so that you are selling articles and preventing the purchasers from using them.

Mr. Cairns.—But we offer a premium of 1s. 6d. a dozen for all bottles returned. And if the public complain of the expense of returning them, those who use them again for the sale of aerated waters are, at all events, bound to have a label, stating expressly that the waters they sell are manufactured by other persons than the Plaintiffs, or negating distinctly the *prima facie* inference from the sale in bottles thus stamped that the thing sold is what the stamp declares it.

[They cited also *Blanchard v. Hill*(a).]

(a) 2 Atk. 484.

A reply was not heard.

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v.
KNOTT.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

This injunction must be dissolved, not, however, upon the ground that the Defendant is at liberty to use the Plaintiffs' bottles in such a manner as to mislead the public into the belief that they are purchasing the Plaintiffs' soda water, when, in fact, they are purchasing that manufactured by himself; but under the special circumstances of the case.

That the Defendant would not be entitled to use the Plaintiffs' bottles in such a manner as, in fact, to mislead the public, although there might be no intention on his part to mislead, is clear. In *Millington v. Fox*(a), Lord Cottenham felt satisfied, that, in using the Plaintiffs' trade marks, the Defendants had no intention to mislead the public; yet, inasmuch as the public were, in fact, misled, he held that the Plaintiffs were entitled to a perpetual injunction. It was not sufficient for the Defendants to say that they used the marks in ignorance of their being the Plaintiffs' trade marks.

How far that doctrine is capable of being reconciled with cases at law in which the *scienter* has been held to be essential in order to enable the Plaintiff to recover, it is not material to consider. In this Court, the rule is clear as laid down in *Millington v. Fox*. And in accordance with that rule, I held, in *Bass's case*, that no one was at liberty to sell ale not made by *Bass* in bottles marked with his label, and so mislead the public.

(a) 3 My. & Cr. 338, 352.

1857.
WELCH
v.
KNOTT.
—
Judgment.

Whether, in selling his soda water in bottles like the present, the onus is not thrown upon the Defendant of informing the public that it is not *Schweppe's* soda water, is a question of considerable importance; but it is one which I am not called upon, at present, to determine; for, in this case, it is manifest Mr. *Chapple* must have known that the Defendant was selling this soda water as his own, and not *Schweppe's*, as clearly as if the Defendant had affixed to the bottles a statement to that effect, and in so many words.

[His Honour showed this from the evidence; and in so doing took occasion to comment upon the weakness of the affidavit compared with the statements in the bill—a circumstance which had escaped the attention of the Court when granting the *ex parte* injunction.]

It was not quite fair in Mr. *Chapple* not to ask expressly for *Schweppe's* soda water. He asks simply for a dozen bottles of soda water; and having given that order, he receives a dozen bottles, of which seven are plain and the remaining five only are stamped with the Plaintiffs' mark. In that state of things he certainly was not in a position to apply for an *ex parte* injunction. He ought, at least, to have asked for an explanation; and had he done so, and had the explanation then been given which has since been made on the part of the Defendant, then, according to what Lord *Cottenham* says in another part of his judgment in *Millington v. Fox*(a), the bill ought not to have been filed. Such an explanation would have been all that the Plaintiffs would have had any right to expect.

It appears to me, under all the circumstances of the case, that this injunction ought not to have been applied

(a) 3 My. & Cr. 354.

for, the sale being not only one in which there was not the most distant attempt on the part of the Defendant to mislead, or to sell the bottles as containing any soda water but his own, but made in such a manner that it is perfectly clear that the purchaser was not, in fact, misled into a belief to the contrary. The injunction, therefore, should be dissolved with costs.

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WELCH
v.
KNOTT.
—
Judgment.

Mr. *Cairns* asked for liberty to bring an action.

The VICE-CHANCELLOR.—Looking to the authority of Lord *Cranworth* in *Farina v. Silverlock*(a), I think I cannot refuse the Plaintiffs liberty to bring an action, this being a case in which there may have been an unlawful, as well as a lawful, user.

(a) 6 D. M. G. 214.

DISSOLVE the injunction, with costs. The Plaintiffs to be at liberty to bring an action.

*Minutes of
Order.*

NOTE.—The Plaintiffs did not had their bill dismissed, they bring an action, and eventually paying all the Defendant's costs.

1858.

Feb. 2nd.

DAVISON *v.* ROBINSON.

Enrolment of Decree—Order for, under 3rd Order of 7th August, 1852—Practice, when intended to appeal to Lord Chancellor.

AFTER the expiration of six calendar months from the time when the decree was made in this cause, notice of motion to enrol the decree was served, by the party in whose favour it had been made, upon all the other parties to the suit.

Upon motion to enrol a decree after the expiration of six calendar months from the time the same shall have been made, if the adverse party appear and signify a bonâ fide intention to appeal to the Lord Chancellor, he is entitled to present a petition for that purpose at any time within the twenty-eight days mentioned in the 3rd Order of the 7th of August, 1852, notwithstanding notice of the motion has been given to all the parties.

Mr. *Torriano*, in moving pursuant to the notice, contended, that, as no caveat had been entered nor any petition of appeal presented, the order to enrol, being applied for on motion and notice to all the parties, ought to be absolute in the first instance.

Mr. *Bagshawe*, jun., *contrâ*, stated, that there was a bonâ fide intention on the part of the adverse party to appeal to the Lord Chancellor, and contended, that, under such circumstances, he was entitled to the twenty-eight days mentioned in the 3rd Order of the 7th of August, 1852(a), for the purpose of presenting his petition of appeal.

But his petition must be presented and answered within twenty-eight days after service of the order to enrol.

Form of order under such circumstances.

(a) The Order is as follows:—
“In case any party is desirous to enrol a decree, or order, or dismissal, after the expiration of six calendar months from the time the same shall have been made, he shall obtain an order for that purpose; and which order, *unless made* by consent of the adverse

party, *or on motion, or notice* to all the parties, shall be a conditional order in the first instance, but shall become absolute without further order, unless cause is shown against it within twenty-eight days after service of the order.”

Mr. *Torriano* in reply:—

The 3rd Order of the 7th of August, 1852, does not apply. By that Order the order to enrol is only to be conditional, where it is not made by consent, "or on motion and notice to all the parties;" where, as here, it is made "on motion and notice to all the parties," no cause being shown against it, the order may and ought to be absolute in the first instance (a).

1858.
DAVISON
v.
ROBINSON.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

As the adverse party has appeared upon this motion being made, and signified a bonâ fide intention to appeal to the Lord Chancellor, he should be at liberty to present a petition for that purpose at any time within the twenty-eight days mentioned in the Order of the 3rd of August, 1852.

Judgment.

But his petition must be presented and answered within twenty-eight days after service of this order.

The proper order to make will be, that the decree be signed and enrolled, unless within twenty-eight days after service of this order, a petition of appeal to the Lord Chancellor be presented and answered.

(a) Seton's Decrees, pp. 591, 592.

1858.

July 30th.

IN RE GAMBOA'S TRUSTS.

*Will—Construction—
"Heirs," Bequest to—Statutes of Distribution.*

Bequest of personalty "to the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control;"—*Held*, that the persons to take were those who at the testator's death would have been entitled under the Statutes of Distribution to the personal estate of the deceased partner in case he had died intestate, and not the heir-at-law strictly so called.

ANSELMO DI GAMBOA, by his will, bequeathed, inter alia, as follows:—"To the heirs of my late partner, *Henry Brooke*, Esq, the sum of 600*l.*, for losses sustained during the time that the business of the house was under my sole control."

A fund having been paid into Court under the Trustee Relief Act to meet this bequest, a petition was presented by the persons who at the testator's death would have been entitled under the Statutes of Distribution to the personal estate and effects of *Henry Brooke*, in case he had died intestate, praying a transfer of the fund to them.

It appeared that *Henry Brooke* was dead at the date of the testator's will; and that, since his death and while the business of the firm in which he and the testator were partners was under the sole control of the testator, losses had been sustained, as mentioned in the will.

Mr. Prendergast, for the Petitioners, contended, that, having regard to the express motive of the bequest, viz to make compensation for losses sustained by *Brooke* while the business of the house was under the testator's sole control, the Petitioners were entitled.

Mr. Osborne, for the heir-at-law, contended, that, where the word "heir" was used in a gift of personalty not as a word of substitution, e. g. "to *Henry Brooke* or his heirs," but as designating the persons to take, which was clearly the effect of a bequest "to the heirs of *Henry Brooke*,"

the word "heirs" must be construed strictly, that is, in the sense of heir-at-law (a).

A reply was not heard.

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IN RE
GAMBOA'S
TRUSTS.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Looking to the purpose of this bequest, I think it clear that the persons intended by the testator are those who at his death would have been entitled under the Statutes of Distribution to the personal estate of *Henry Brooke* in case he had died intestate (b), and not his heir-at-law.

Judgment.

The bequest is "to the heirs of my late partner," not simply, but "for losses sustained during the time that the business of the house was under my sole control,"—which would be unmeaning if the testator intended to benefit the heir strictly so called. Had it been "to the heirs of my late partner" simply, I should not have felt so clear upon the point.

The Petitioners, therefore, are entitled to the fund.

(a) See *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524.

(b) See *Doody v. Higgins*, 2 K. & J. 729.

NOTE.—The following collection of additional authorities on this subject may be found convenient:—Co. Litt. 10. a.; Viner's Abridgment, tit. "Heir," Ca. 5, pl. 1, 8; Sheppard's "Touchstone," 446; *Danvers v. The Earl of Clarendon*, 1 Vern. 35; *Pleydell v. Pleydell*, 1 P. Wms. 747; *Lowndes v. Stone*, 4 Ves. 648 (as to which see 2 My. & K. 76 and 794, 2 Sim. 540, and 10 Cl. & F. 253); *Forster v. Sierra*, 4 Ves. 766; *Holloway v. Holloway*, 5 Id. 399; *Vaux v. Henderson*, 1 Jac. & Walk. 388 (as to which see 4 Russ. 386, 387; 14 Sim. 340; 15 Sim. 178; and 3 H. L. C. 542, 554); *Gwynne v. Muddock*, 14 Ves. 488; *Swaine v. Burton*, 16 Ves. 365; *Mounsey v. Blamire*, 4 Russ. 384; *Tidwell v. Ariel*, 3 Madd. 403; *Waite v. Templer*, 2 Sim. 524; *Gittings v. M'Dermott*, 2 My. & K. 69; *Evans v. Salt*, 6 Beav. 266; *Boydell v. Golightly*, 14 Sim. 327; *Ware v. Rowland*, 15 Sim. 587, S. C. on Appeal, 2 Phill. 635; *Tellow v. Ashton*, 21 Law J., N. S., Ch. 53.

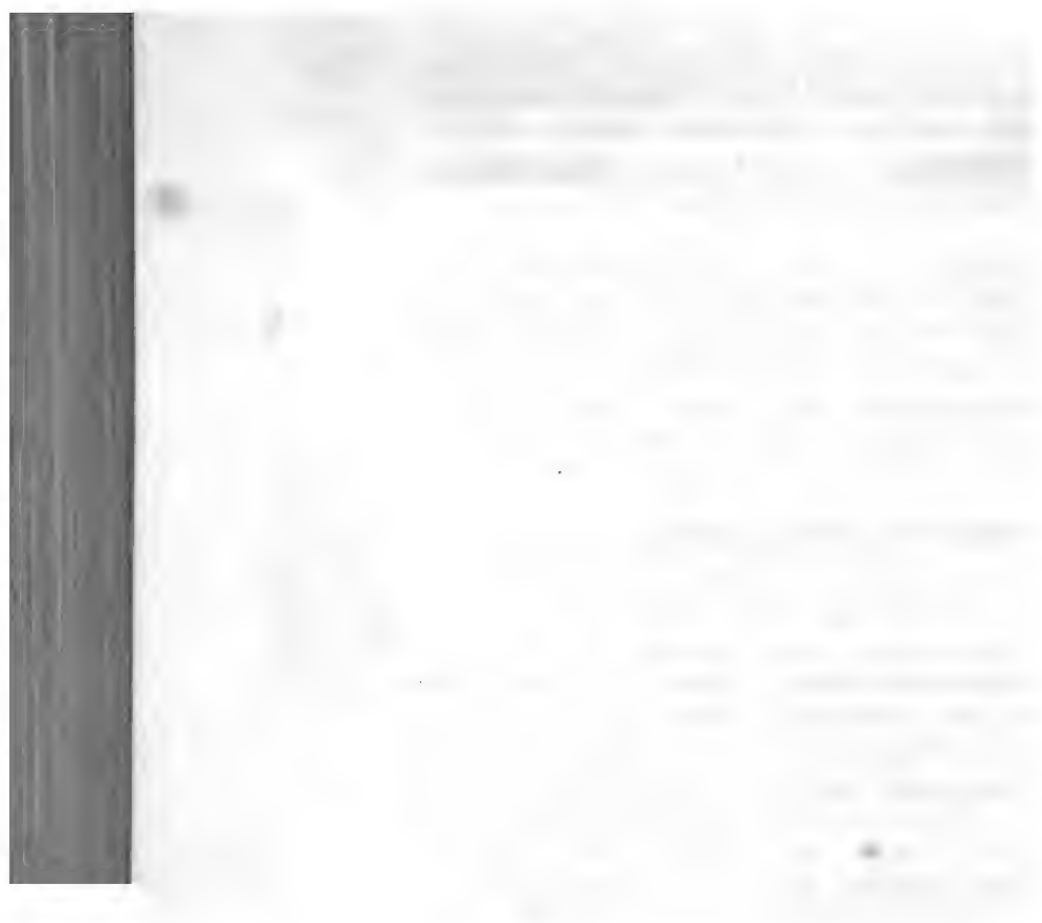


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The authorities have estab-

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lished that this presumption will arise where a purchase is made in the name of a wife, a legitimate child, or a grandchild whose father is dead; and also, as it would seem, upon a purchase made in the name of an illegitimate child.

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Summary order upon a petition under the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37) against assignees in bankruptcy of a country solicitor, who had employed a London agent, to deliver their bills of costs; and against agent to deliver his bill of costs and petitioner's papers in his possession.

Such petitions should be intitled in the matter of both solicitors; but a petition in the matter of a solicitor need not be intitled in the matter of the Act. *In re Walton (a Solicitor)*, 78

AUTHOR AND PUBLISHER.

Agreement between the author of a work and a publisher, by which

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the publisher agreed to publish the work at his own expense and risk, and, after deducting all charges and expenses, and a per-centage on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed of the work were to be equally divided between the author and publisher—*Held*, to create a joint adventure between the parties, which the author was at liberty to terminate upon notice to his publisher after the publication of a given edition, it appearing that, at the date of such notice, no fresh expense had been incurred by the publisher in printing, advertisements, or otherwise, since the publication of that edition.

Held, also, that the circumstance of the publisher having stereotyped the work previously to the publication of the last published edition, did not affect the right of the author to terminate the agreement as above.

On the meaning of the word "edition," as applied to cases where a work is stereotyped and printed in "thousands." *Reade v. Bentley*, 656

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The doctrine in *Dearle v. Hall* (3 Russ. 1) as to the importance of notice of an assignment of an equitable interest in a chose in action, applies to assignees under a commission in bankruptcy equally with particular assignees.

Assignees under a commission in bankruptcy omitting to give such notice, postponed to a subsequent assignee for value, who gave due notice of his assignment.

The bankrupt deposed that, at

the time of his bankruptcy, one of four trustees of a fund in which he had a contingent reversionary interest, was his intimate friend, and was consulted by him in reference thereto and to the course he should adopt; that upon the occasion of the sale by order of the assignees in bankruptcy of the leasehold premises where the bankrupt's business had been carried on, such trustee lent him money to purchase the premises, and that the money lent was secured upon such lease—*Semble*, these circumstances, if believed by the Court, would not have constituted such notice of the rights of the assignees in bankruptcy as to give them priority over a subsequent assignee for value who gave due notice of his assignment. *In re Barr's Trusts*, 219

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A plaintiff filing a bill for discovery in aid of his defence to an action at law is at liberty, after filing interrogatories, to move to stay proceedings in the action without waiting for an answer, or even for the expiration of the eight days allowed under the old practice.

Motion to stay trial of an action until answer to such a bill, refused on the ground of delay and the nearness of the trial, notwithstanding the bill was filed eleven days after discharge of a rule for Defendant to show cause

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A judgment creditor will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding such creditor has, since the mortgage, but before notice thereof to the trustee of the fund, obtained, under the Act 1 & 2 Vict., c. 110, s. 14, an order charging the fund.

In such a case, the rule in *Dearle v. Hall* (3 Russ. 1) does not apply in favour of the judgment creditor.

Observations on *Watts v. Porter* (2 Ell. & Bl. 743). *Scott v. Lord Hastings*, *Beavan v. Macqueen*, and *Lord Hastings v. Beavan*, 683

CHARITY.

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CHARTER.

A charter of incorporation was granted to a company on condition that no person should be admitted

to the company's building or grounds on the Lord's Day in consideration of any money payment, whether made directly or indirectly, unless the sanction of the Legislature should have been obtained. The company having obtained an Act of Parliament, authorising their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the company from any condition contained in the charter, advertisements were issued by the directors, offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days:—*Held*, that the admission of any person on Sunday by means of such a ticket as proposed would occasion a forfeiture of the company's charter; and upon bill filed by a shareholder, the company was restrained from accepting a surrender of any shares in exchange for such tickets of admission. *Rendall v. The Crystal Palace Company*, 326

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COMPANIES.

Holders of stock or shares which are "to bear and receive dividends at a given rate per cent. per annum in preference to the payment of dividend on the ordinary shares of the company" are entitled to receive such dividends out of profits whenever accruing (and not merely out of the profits of the current half-year or year, or of any other definite periods) before any holder of ordinary shares can participate in any profits whatever.

Secus, had the stocks or shares in question been directed to bear and receive *half-yearly* or *yearly* dividends, or the like—*semble*.

Therefore, where a fund, which under ordinary circumstances would have represented the half-year's pro-

fits of a railway, as shown at the usual half-yearly general meeting, was applied pursuant to the provisions of a special Act of Parliament in buying up fictitious stock, including preference stock fraudulently issued by a servant of the company, and no dividend was declared as previously for that half-year:—*Held*, that all holders of preference stock or shares, such as first above-mentioned, were entitled to be paid dividends out of subsequent profits before any payment could be made to any holder of ordinary shares; the loss occasioned by the issuing of such fictitious stock being in this respect like loss from ordinary accident or robbery, and as such to be deducted from gross receipts before the true profit could be ascertained.

The Act contained a clause providing that the directors should apply any balance of the fund thereby directed to be applied for making good the losses above mentioned, in paying to the proprietors of preference stock or shares the dividends to which they would have been entitled out of the fund if the same had been declared and apportioned as dividend at the half-yearly meeting—*Held*, that the remedy thereby given to the proprietors of such preference stock or shares was cumulative, and by way of security to them for the amount of their dividend, and not in substitution of such dividend.

Whether the same interpretation would have been put upon this clause in case the preference shareholders had not been of right entitled as above to arrears—*quære*.

Whether any difference exists between preference shares and guaranteed shares in reference to the right to arrears *ut supra*—*quære*.

A company is empowered by Act of Parliament, with the assent of three-fifths of the votes at any general

meeting, to guarantee the payment of dividends not exceeding a given percentage per annum on certain shares, in preference to the payment thereof on the ordinary shares of the company, and upon such terms as shall be by the resolution of such meeting defined. The company, having issued shares purporting upon the face of the certificate to be issued under the provisions of this Act, and having received the money and paid dividend upon it, cannot afterwards object that, at the general meeting, three-fifths of the votes did not assent; still less can they object that the holders of such shares have not shown such assent, the onus being on the company so issuing shares to show informality—*semble*.

Where a company, having power by Act of Parliament to issue stock with or without guarantee, issues stock purporting on the face of the certificate to be "issued under the provisions of the Act," such stock carries the guarantee, and not merely a preference—*semble*.

No resolution of a company qua company authorising division of a fund such as that above mentioned to purposes other than dividend can vary the rights of the shareholders inter se in reference to the general profits. *Secus*; where a particular class of shareholders, e. g., preference shareholders, grant proxies in that particular capacity, authorising a fund which would be appropriated in payment of their special dividend to be diverted to other purposes—*semble*. *Henry and Others v. The Great Northern Railway Company and Others*, 1.

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CONVERSION, TRUST FOR.

Where real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor, or not until after his decease, the property to that

COPYHOLDS.

extent results to the settlor as personality from the moment the deed is executed.

Settlement of real estate by deed (not enrolled) to use of settlor for life, with remainder (subject to a power of revocation, which he never exercised) to use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at settlor's death, and to apply the residue to charitable purposes. *Held*, following *Hewitt v. Wright* (1 Bro. C. C. 86), that, notwithstanding the trust was not to arise until after settlor's death, the property was impressed with the character of personality immediately upon the execution of the deed, and the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personality. *Clarke v. Franklin*, 257

CONVEYANCING COUNSEL OF THE COURT.

See SETTLED ESTATES ACT.

COPYHOLDS.

1. This Court has concurrent jurisdiction with courts of law to relieve a copyholder against an illegal seizure of the copyhold property by the lord of the manor.

Demurrer to a bill for such relief over-ruled. *Andrews v. Hulse*, 392

2. A., seised in fee of twelve 24th parts of a manor held by several as tenants in common, purchased lands holden of the manor, which were thereupon surrendered to a trustee for him, and afterwards to himself in fee, and he was admitted tenant of the entirety by the act of all the lords—*Held*, that twelve 24th part

of his copyhold interest in the lands merged in his freehold estate therein as lord of the manor.

The law as to the divisibility of manors, and the consequences of a division, considered. *Cattley v. Arnold*, 595

COPYRIGHT.

The provisions of the Copyright of Designs Act, 1842 (5 & 6 Vict. c. 100, s. 15), relative to furnishing the Registrar of Designs with copies, drawings, or prints of the design to be registered, previously to obtaining registration—*Held*, to have been complied with by furnishing him with a specimen of the article itself to which the design was applied. *Norton v. Nichols*, 475

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CORNWALL, DUCHY OF.

Lands, parcel of the Duchy of Cornwall, and governed by the custom of that duchy,—the tenure of which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years, under penalty of forfeiture, no surrender to the uses of a will being required—*Held*, to pass by a general devise made previously to the Act 55 Geo. 3, c. 192. And the circumstance of such general devise being followed by a devise of all testator's duchy lands to one for life—*Held*, not to prevent its passing the reversion. *Usticke v. Peters*, 437

COST BOOK.

See MORTMAIN, 1.

COSTS.

1. Where exceptions to an answer are allowed, costs do not follow as of course, but must be asked for expressly by the successful party. *Earp v. Lloyd*, 58

2. Parties properly made Defendants to a suit in the first instance, and afterwards giving notice to Plaintiff that they do not claim any interest, are not entitled to their costs, notwithstanding such notice was given before putting in their answer, unless they have gone on to offer their consent to have the bill dismissed against them without costs up to the date of such notice.

And it rests with Defendants to offer such consent, and not with Plaintiffs to ask it. *Talbot v. Kemshead*, 93

3. Rule as to costs where the Bank of England is Defendant. *Bathe v. The Bank of England*, 564

4. In suits for redemption, to entitle a Defendant, who has never claimed an interest, to his costs, he is not bound to show that he has disclaimed, or given notice to that effect before he was made a Defendant to the suit.

A devisee of mortgage estates, in a suit for redemption, disclaimed after the suit had been revived against him, denying that he ever had or claimed any interest—*Held*, that he was entitled to costs, notwithstanding persons who had acted as his solicitors in other matters, on being applied to by Plaintiffs before he was made a Defendant to know whether he claimed an interest, had neglected to return any answer to such application.

The rules laid down in *Ford v. Lord Chesterfield* (16 Beav. 520), as

to costs of disclaiming Defendants in suits for foreclosure or redemption approved. *Bellamy v. Brickenden*, 670

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CREDITORS' SUIT.

Where lands subject to a mortgage had been sold under a decree in a creditors' suit, the mortgagee joining in a conveyance of the lands freed from his mortgage — *Held*, that he was entitled to have the expenses of the actual sale, but no more, borne out of the proceeds of the sale, the other costs and expenses being left to be defrayed out of the general assets. *Berry v. Hebblethwaite*, 80

CROWN, OFFICERS OF THE.

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CROWN RIGHTS.

1. The Defendants claimed, as woodwards or foresters of the Crown, a right to grant to certain free miners gales or licenses for working stone quarries in uninclosed lands, part of the Forest of Dean, the soil whereof was in the Crown, to exact gale fees or rents in respect thereof, and to apply the same to their own use without accounting to the Crown:—*Held* (independently of the considerations that the alleged right, had it existed, would have been extinguished by the Dean Forest Mines Act, 1 & 2 Vict. c. 43, and that the evidence failed to establish the exercise of any such right in point of fact), that no such right could exist in point of law: for, with regard, first, to the free miners, it was a claim to subvert the soil and carry away the substratum without stint or limit, which could not be established (1) by custom, for it was a profit à prendre, which cannot be claimed in alieno solo; nor (2) by prescription, for prescription, to be good, must be both reasonable and certain, and this was neither; nor (3) by presuming a lost grant, for prescription presupposes a grant, and if such a grant cannot be presumed before, a fortiori it cannot after, the period of legal memory; and a claim which cannot lawfully be made upon one of these three foundations, cannot be substantiated by a user, however long, and is not saved by any Statute of Limitations; and with regard, secondly, to the defendants, besides the foregoing objections, they could not show a valid prescription exempting them, as officers of the Crown, from accounting for the proceeds of the Crown's soil which they had sold. *The Attorney-General v. Mathias*, 579

CROWN RIGHTS.

2. The office of woodward or forester of the Crown is an office of trust incapable of assignment without a license from the Crown founded on the return to a writ of *ad quod damnum*.

Whether such an office can be annexed to a manor—*quere. Ib.*

See SEA SHORE.

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1. Dower of a woman whose marriage was since 1 Jan. 1834—*Held*, following *Fry v. Noble* (20 Beav. 598; *S.C.*, on appeal, 2 Jur. N. S. 128), not excluded by the ordinary limitations to uses to bar dower in a conveyance before the Act. *Clarke v. Franklin*, 266

2. Under the late Dower Act (3 & 4 Will. 4, c. 105) a widow has no right, as against the heir-at-law of her deceased husband, to be indemnified in respect of a mortgage created by the deceased.

Therefore, where, in a case of that description, the mortgage property had been sold by order of the Court in a suit for administration of an intestate's estate—*Held*, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage. *Jones v. Jones*, 361

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EAST INDIA STOCK.

While the Act 3 & 4 Will. 4, c. 85, for the regulation of the East India Company's Charter, was in force, the capital stock of the Company was not "a Government or Parliamentary stock or fund," nor was it "a foreign stock or fund." *Brown v. Brown*. 704

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ENROLMENT OF DECREE.

Upon motion to enrol a decree, after the expiration of six calendar months from the time the same shall have been made, if the adverse party appear and signify a *bonâ fide* intention to appeal to the Lord Chancellor, he is entitled to present a petition for that purpose at any time within the twenty-eight days mentioned in the 3rd Order of the 7th of August, 1852, notwithstanding notice of the motion has been given to all the parties.

But his petition must be presented and answered within twenty-eight days after service of the order to enrol.

Form of order under such circumstances. *Davison v. Robinson*, 754

EVIDENCE.

1. Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen, the signature of the notary must be verified before the affidavit can be filed, unless by consent; and the Court cannot take judicial cognisance of the notarial seal alone as a sufficient verification. *In re Earl's Trust*, 300

2. Where any question of fact depends upon the testimony of a single witness, and any inconsistency is apparent between such testimony and the previous conduct of the witness, the Court will look rather to the

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acts done by him at the time than to his statements when called as a witness. *In re Barr's Trusts*, 219

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EXECUTORS.

An executor is entitled to retain his debt, although barred by the Statute of Limitations during the lifetime of the testator.

Therefore, where an executor, under a mistake of facts, had made yearly payments to his testatrix for twenty-five years previous to her death, he was held entitled to retain the amount out of her residuary estate.

Contrary dictum of *Bayley, J.*, in *McCulloch v. Dawes* (9 Dowl. & Ryl. 43), disapproved. *Hill v. Walker*, 166

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FEME COVERTE.

A married woman can elect so as to affect her interest in real property, without deed acknowledged under the Act 3 & 4 Will. 4, c 74;

and, where she has so elected, the Court can order a conveyance accordingly; the ground of such order being, that no married woman shall avail herself of fraud.

By ante-nuptial settlement, the intended husband covenanted to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children of the marriage. The wife, having attained twenty-one, filed a bill by her next friend against her husband, and obtained a decree for specific performance of the covenant, with directions for raising the costs out of the estate; and, by virtue of the decree she received, during the husband's lifetime, 50*l.* on account of rents to her separate use. The husband dying a month after the decree, *Held*, upon petition by the children, that these acts on the part of the wife amounted to an election, and that she was bound by the decree; and she was ordered to settle the premises accordingly.

Lassence v. Tierney (1 MacN. & Gor. 551), and *Field v. Moore* (19 Beav. 176; S. C., 2 Jur., N. S., 145), explained. *Barrow v. Barrow*, 409

2. A married woman, deserted by her husband, was left executrix and residuary legatee under a will; after proving which she obtained from a magistrate, under the 21st section of the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85) an order for the protection of her property—*Held*, that she was entitled to transfer Consols standing in the name of her testatrix in the books of the Bank of England, and to receive dividends thereon, as if she were a feme sole.

And, *semble*, the same rule would have applied if she had been merely executrix, without taking any bene-

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ficial interest under the will. *Mary Bathe v. The Governor and Company of the Bank of England*, 564

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FRAUD.

See FEME COVERTE.

JOINT STOCK COMPANIES.

FRAUDS ON POWERS.

See POWERS, 1.

FREEMAN OF CITY OF LONDON.

See WILLS, 2.

GENERAL BEQUEST.

See WILLS, 5.

GOVERNMENT STOCK.

GOVERNMENT STOCK.

See EAST INDIA STOCK.

GRANT.

See SETTLEMENT, 1.

GUARANTEED SHARES.

See COMPANY, 1.

HEIR-AT-LAW.

See DOWER, 2.
WILLS, 6.

"HEIRS," BEQUEST TO.

See WILLS, 16.

HOUSE OF LORDS.

See JURISDICTION, 2.

HUSBAND AND WIFE.

The power of a wife to contract with her husband is not confined to her separate property, but extends to other matters, as to which she can be regarded for the purposes of the contract as a feme sole. Thus, a wife suing her husband for a divorce on the ground of adultery and cruelty, may contract with him to abandon her suit, and the Court would not refuse specific performance of such a contract upon the mere ground of the absence of a trustee—*Semble*.

But where such a contract contained stipulations for the custody by the wife of children above seven years of age, and special stipulations as to their religious education, and a bill was filed by the wife for specific performance, a demurrer was allowed—1st, because such stipula-

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tions related to matters to which her privilege to be regarded as a feme sole did not extend; 2ndly, because they could not be enforced against her in case she refused to adhere to them; and 3rdly, because it would be contrary to public policy to allow a husband, although guilty of adultery and cruelty, thus to transfer to his wife his rights and duties in reference to his children.

Costs—Principles upon which the Court acts in reference to costs in such cases. *Vansittart v. Vansittart*, 62

See ADVANCEMENT OR PROVISION.
DOWER.

INCOME TAX.

Testator, by his will, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500*l*. "free from legacy duty and other deductions."—*Held*, that the annuity was subject to income tax under the Act 16 & 17 Vict. c. 34, to be paid out of the annuity itself. *Sadler v. Richards*, 802

INDIA STOCK.

See EAST INDIA STOCK.

INFANT MORTGAGEE.

See TRUSTEE ACT, 1850.

INFANT, SETTLEMENT ON MARRIAGE OF.

See FEME COVERTE.

INFANTS.

Army agents advancing reasonable sums of money to a minor, on the assurance that he required them for regimental purposes—*Held*, in the absence of fraud, entitled to a

lien for the amount upon the proceeds of the sale of his commission, the agent not being fixed with notice of any impropriety in the sale, or other mala fides in the transaction. *Laure v. Banks*, 142

See VENDOR AND PURCHASER, 1.

INFRINGEMENT OF PATENT.

See PATENT, 2.

INJUNCTION.

In a suit to restrain an alleged infringement of Plaintiff's copyright in a design registered under the Act 5 & 6 Vict. c. 100, the Defendant does not lose his right to require the Plaintiff to establish his title in an action at law, although he delays doing so until the hearing of the cause, and has previously moved to dissolve upon a ground which cannot be maintained.

But Defendants ordered to pay the costs of motion to dissolve, that motion being useless whatever might be the result of the cause. *Norton v. Nichols*, 475

See JOINT STOCK COMPANIES WINDING-UP ACTS.

JURISDICTION, 2, 4.

LESSOR AND LESSEE.

MORTGAGOR AND MORTGAGEE.

PATENT.

PUBLIC WORKS.

TRADE MARK.

INSURANCE COMPANY.

A policy of insurance, headed "Capital £100,000," provided that such capital, and other the property of the insurance society remaining at the time of any claim, should alone be liable to make good all claims upon the society under the

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policy; and that no shareholder should, by reason of the policy, be in anywise individually or personally liable to any such claims, or be in anywise charged by reason thereof, beyond the amount unpaid of his shares in the said capital.

An application by the assured for leave, under the 7th section of the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), to issue execution or take proceedings against an individual shareholder, who had paid in full upon his shares, in respect of the amount the assured had recovered in an action on the policy against the official manager of the society, was refused with costs, the Court being of opinion—

(1.) That the terms of the policy precluded the assured from any remedy at law against an individual shareholder.

(2.) That, even if, upon the construction of the company's deed of settlement, the policy was in this respect less favourable to the assured than the deed required (which, *semble*, was not the case), that circumstance could not be insisted upon for the benefit of the assured, his rights being defined by the contract into which he had actually entered.

(3.) That, assuming the mention made in the policy of the capital stock of 100,000*l.* to be equivalent to a representation that the society's capital actually amounted to 100,000*l.*, and to be a fraud on the part of the directors, the capital subscribed for at the date of the policy not exceeding 44,000*l.*, that circumstance would not entitle the assured to have execution against an individual shareholder. *In re the Athenæum Life Assurance Society, and in re the Prince of Wales Life Assurance Society; Ex parte Durham*, 517

INTEREST.

INTEREST.

See WILLS, 13.

INTERNATIONAL LAW.

Primâ facie, and unless the contrary be expressed, or be implied from the absolute necessity of the case, every Legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights. *Cope v. Doherty*, 367

INVESTMENTS IN JOINT NAMES.

1. Sums of stock purchased in the joint names of two sisters, and a balance to their joint account at their banker's—*Held*, under the circumstances, to belong to them as tenants in common, notwithstanding they had contributed equally; the Court looking (inter alia) to the source whence the funds were derived, viz., rents of land of which the two were tenants in common. *Robinson v. Preston*, 505

2. As to the effect of a payment of moneys, in which two or more persons are interested as tenants in common, to their joint account at a banker's, without more—*quære. Ib.*

3. The rule as to the investment of moneys in the names of two or more persons in the purchase of property, is this:—If invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, it is considered by this Court to be a joint tenancy, and no

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equity is supposed to intervene by which it can be reduced to a tenancy in common.

Harris v. Fergusson (16 Sim. 308) explained. *Ib.*

ISSUE, TRIAL OF.

The circumstance that the Plaintiff in an issue was dead when the issue was tried, being unknown at the trial—*Held*, not to afford ground for a new trial. *Bird v. Kerr*, 270

JOINT STOCK COMPANIES.

1. Three persons who had taken shares in a joint stock company, proved, that, when they signed the company's deed, it contained a false sheet (which had been fraudulently inserted, and to all appearance formed an integral part of the instrument) limiting the liability of shareholders to the amount of their shares; whereupon, in winding up the company, and settling the list of contributories, they were released—*Held*, that their release did not affect the liability of those who executed the deed after the false sheet had been removed, and the deed restored to the form in which it was originally registered, notwithstanding the latter had executed the deed upon the faith of those three persons being shareholders.

Distinction, in this respect, between joint stock companies and private partnerships. *In re the Athenæum Life Assurance Society. Richmond's Case, and Painter's Case*, 305

2. The capital of a joint stock company was fixed at 10,000*l.*, but with power for a general meeting of the shareholders duly convened according to certain forms, and by a majority of two-thirds of the then shareholders,

to increase that amount to 100,000*l*. No such meeting was held, but a false entry was made by the chairman in the minute book of the company, stating, that, at an extraordinary general meeting of the company, it had been resolved to increase the capital from 10,000*l*. to 100,000*l*. The capital having been de facto increased, new shares having been issued and taken, profits having been made upon the increased capital, and dividends paid on such profits among all the shareholders for four years—*Held*, that the shareholders must be taken to have acquiesced, and could not now object to the irregular manner in which the shares had been increased. *Ib*.

3. A director of a joint stock company proposed to his co-directors, that, for the benefit of the company, each of them should take a certain number of shares to be held in trust for the company; and, to set an example, he signed the deed for 2,000 shares. No note of the proposal was entered on the minutes, nor were the shares handed over to him. No other director followed his example; but, subsequently, he being still a director, his name was returned to the stamp office for the shares. Afterwards, having ceased to be a director, and having reason to know that the company was in failing circumstances, he procured his shares to be cancelled by the directors—*Held*, upon the terms of the company's deed of settlement, that this was ultra vires on the part of the directors,—they having no power to cancel or diminish the capital, but only to forfeit shares for the benefit of the company,—and was a fraud on the part of the shareholder; who was accordingly held to be a contributory in respect of those shares. *Ib*.

4. The deed of settlement of an insurance society, registered under 7 & 8 Vict. c. 110, after empowering the directors to effect insurances on lives upon such terms and conditions and in such manner as they should think proper, provided that every policy or other instrument required in any of the transactions aforesaid should be given under the hands of not less than three of the directors, and sealed with the common seal of the society: and that there should be contained therein, and in every other contract to be entered into on behalf of the society in or about the premises (meaning in or about matters connected with insurance), a reference to the deed and a proviso negating an unconditional liability. The deed also declared, that it should be competent to a board of directors to exercise certain general powers, and generally where the deed was silent or did not otherwise provide, to act in the direction of the affairs of the society in such manner as in their absolute discretion they should think most conducive to its interests—*Held*, that a memorandum signed by three of the directors, but not under the seal of the society, stipulating that, on payment of certain premiums, the society would guarantee an assurance therein mentioned, and would issue, when required, a stamped policy in the form authorised by their deed of settlement, was binding upon the general body of the shareholders, and created a good equitable debt.

State of the law as to the liability of persons dealing with companies registered under the Act 7 & 8 Vict. c. 110, to make themselves acquainted with the company's deed of settlement, and to see that its requirements are complied with. *In re the Athenæum Life Assurance Society*, 549

5. Evidence required, in the case of joint stock companies, before the Court will conclude that an act of the directors not authorised by the company's deed of settlement has been acquiesced in by the shareholders. *Ex parte the Eagle Insurance Company*, 549

JOINT STOCK COMPANIES WINDING-UP ACTS.

1. Injunction to restrain proceedings at law for the purpose of making a company bankrupt refused, notwithstanding an order had been made for winding up the company, and an official manager and creditors' representative had been appointed before the commencement of such proceedings,—the creditors' representative appearing and expressing his consent to their prosecution.

Right of a creditor to attend and supervise proceedings in chambers under the Winding-up Acts in any way he may consider desirable for securing payment of the debts of the company.

Proper course to be taken by creditors' representative for this purpose.

Interpretation of The Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78). *In re the London and Eastern Banking Corporation*, 273

2. The parties who subscribe the usual subscribers' agreement of a projected joint stock company become co-contractors with each other, and are bound to each other by the terms of the agreement; and if it should appear that there has been any special dealing between two or more of their body, tending to vary the operation of the agreement, the rest cannot be affected by that circumstance, except so far as they are

shown to have been cognisant of and to have acquiesced in the transaction, so that their consciences are bound.

Provisional directors of a company, to be incorporated by Act of Parliament, propose to a contractor that he shall have the contract for the company's works, provided he will accept payment partly in share; the number of shares to be settled by the company's engineer, but contractor to sign the subscribers' agreement for a sufficient number to make up the amount required by the Standing Orders of Parliament. The contractor having accordingly signed for 620 shares of 10*l.* each, and the Act having then been obtained, he sends in a tender, which is accepted by the directors, agreeing to execute the works for 24,000*l.*, to be paid, as to 3,000*l.*, in shares. The scheme being abandoned before the works were commenced—

Held (1.) Upon the construction of the deed, that the arrangement made by the directors with the contractor was ultra vires.

(2.) That, if not a fraud on the Standing Orders of the House of Lords (as to which *quære*), it was void as against such of the parties subscribing the deed as were not privy to it.

(3.) That the circumstance of the contractor having signed the deed last but one, the last subscriber being privy to the arrangement, did not alter the rights of those subscribers to the deed who were not privy to it.

(4.) That, as no call had been made, nor any thing done to call the attention of the subscribers to the number of shares for which any subscriber was registered, the circumstance of the contractor having been registered for nearly four years as the holder of only ten shares, did not preclude the company from in-

sisting that he was liable for the whole 620.

Held, therefore, that (whatever equity the contractor might have against the directors) as against the company, he must be included in the list of contributories for the entire number of shares for which he had signed the deed. *In re The North Shields Quay and Improvements Company; Davidson's case*, 688

3. A shareholder, who has failed before the Chief Clerk in an attempt to have his name removed from the list of contributories, and adjourns the question into Court, if he fails on the hearing in Court, pays all the costs of that hearing. *Ib.*

See INSURANCE COMPANY.

JOINT TENANCY.

See INVESTMENTS IN JOINT NAMES.

JOINTURE RENT CHARGE.

See SETTLEMENT, 1.

JUDGMENT.

See CHARGING ORDER.

JUDICIAL COGNISANCE.

See EVIDENCE.

MERCHANT SHIPPING ACT, 1854.

JURISDICTION.

1. This Court will not order original documents to be taken out of the jurisdiction of the Court for the purpose of their being produced before a special examiner on the examination of witnesses in the cause, unless a special case be made for that purpose.

But, *semble*, the Court has jurisdiction, upon a special case being

made, to make such an order. *Lafone v. The Falkland Islands Company* (No. 2). 39

2. The authorities as to the jurisdiction of this Court to interfere at the instance of parties claiming real property under a legal title, by appointing a receiver of the rents and profits, and by injunction to restrain waste, examined.

They establish these propositions:

—1st. In the absence of fraud, and where there is no privity between the parties, this Court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. 2nd. Nor will it interfere, at the like instance, to restrain waste, except malicious or destructive waste, *e. g.*, by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at law. 3rd. But flagrant acts of this exceptional character would at the present day be restrained, and that before judgment at law, and notwithstanding Plaintiff were out of possession, and his title denied on oath by Defendant.

Therefore, where a bill alleged that Plaintiff was Earl of *Shrewsbury*, and entitled as such to real estates inalienably annexed to the earldom by Act of Parliament, his title as to part, called the settled estates, being legal, and as to the rest, called the unsettled estates, being equitable; that his claim to the earldom had been heard in the House of Lords before a Committee of Privileges, who had already expressed a strong opinion (although they had not actually decided) in his favour; that Defendants, claiming under a will of the late Earl, "by favour of some of the tenants," had entered into

receipt of the rents of the settled estates to an amount exceeding 25,000*l.* a-year; and that they had cut down considerable quantities of timber on the estates generally, some of an ornamental character and some not ripe for cutting; and charged that many of the tenants of the settled estates, by reason of the conflicting claims to the earldom, had refused to pay their rents to Plaintiff or Defendants, by reason whereof rents exceeding 5,000*l.* a year were in danger of being lost; and prayed that, pending Plaintiff's proceedings to establish his claim to the earldom, and proceedings by ejectment, which he offered to bring when that claim was established, a receiver might be appointed, and the Defendants restrained from cutting timber on the estate: a demurrer was allowed to so much of the bill as sought relief in respect of the settled estates; the Court being of opinion that the amount at stake did not affect the question, that the unpaid rents (5,000*l.* per annum) need not be lost (since, if an action were brought, they would be paid either to Plaintiff or into Court upon interpleader), and that the waste alleged was not such as to justify interference.

And to so much of the bill as sought relief in respect of the unsettled estates, a plea that Plaintiff was not Earl of *Shrewsbury* was allowed.

Whether, pending his claim in the House of Lords, Plaintiff could not have taken proceedings at law to recover the estates; and whether, if otherwise entitled here to summary relief, he ought not to satisfy the Court that an action is pending between him and Defendants, which will try his right—*Quære*.

Dicta of Sir A. Hart, in *Lloyd v. Lord Trimleston* (2 Moll. 81), as to the effect of possession obtained by favour of the tenants, considered.

His remark that such possession has not the quality of an authorised possession, and that a devisee so let into possession does not acquire any right, was meant to apply to some case of fraudulent or forcible possession which the law will not authorise—not to such a possession as would put the heir to legal process for the recovery of his right. *Talbot (Earl) v. Hope Scott*, 96

3. Where by Act of Parliament lands were vested in trustees upon trust for sale, and subject thereto upon trusts annexing the rents inalienably to the earldom of *Shrewsbury*, and the last earl attempted to disentail and devise the property annexed to the earldom to the same trustees upon trust for a particular claimant, and the trustees accepted that trust, and claimed to receive the rents in that character, pending proceedings by the Plaintiff to establish his claim to the earldom,—a receiver was ordered of the estates (if any) vested in the trustees, of which the tenants were not paying rent to them, and the Defendants were put upon an undertaking as to the rest; upon the ground that the trusts they had accepted under the will were in conflict with the prior trusts upon which they held the estates. *Talbot (Earl) v. Hope Scott*, 139

4. Injunction to restrain Defendants in possession from stripping an estate of timber, granted upon motion by a Plaintiff claiming under a title at law. *Neale v. Cripps*, 472

5. This Court has no jurisdiction, either under the 50th section of the Act 15 & 16 Vict. c. 86, or otherwise, to make a declaration of right, unless it be one upon which the Court could act, if required, by granting consequential relief.

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Where the declaration sought is not of that nature, the Court has no jurisdiction to entertain the suit.
Bristow v. Whitmore. 743

See COPYHOLDS.

JUS TERTII.

See PRODUCTION OF DOCUMENTS, 2.

LACHES.

See PUBLIC WORKS.
SECURITY FOR COSTS, 1.

LANDS, AFTER-ACQUIRED.

See WILLS, 14.

LAPSE.

See WILLS, 3, 6.

LEASE.

Although, *primâ facie*, a lessor shall not be taken to have intended to enter into a covenant for perpetual renewal, yet if there be in the lease expressions indicative of such an intention, the Court will give effect thereto.

Lease for lives, with a covenant on the death of either of the cestuis *que vie* to execute a renewed lease at the same rent and subject to the same covenants "including this present covenant"—*Held*, a covenant for perpetual renewal, and lessee entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease, but with the name of the new cestui *que vie* substituted for that of the deceased.

Distinction as to the form of the renewed lease, in this respect, where the reversion has become vested in a trustee. *Hare v. Burges*, 45

LESSOR AND LESSEE.

LEASE, MINING.

See LESSOR AND LESSEE.

LEGACY SINKING INTO DE-
VISED ESTATE.

See WILLS, 6.

LESSOR AND LESSEE.

The lessee of a mine covenanted by his lease, at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things, and materials which should have been used in and about the working of the mine, upon receiving twelve months notice from the lessor, and being paid for the same according to a valuation. In a subsequent part of the lease it was provided, that it should be lawful for the lessee at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things, and materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice thereinbefore mentioned, and upon paying the price estimated. The deed also contained a covenant by the lessee, not to do any act which might occasion or tend to produce the drowning of the mine.

Fourteen years before the expiration of the term the lessee became insolvent, and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same unless he should be minded to purchase.

To a bill by the lessor, averring that such removal would occasion or tend to produce the drowning of the mine, and praying for an injunction

to restrain the same until the end of the term, and until the Plaintiff had the opportunity of exercising his option to purchase, a demurrer was allowed, the Court being of opinion, that, according to the true construction of the lease, the lessee was to be at liberty to remove all the property in question unless the lessor gave notice of his intention to purchase, and paid for the same. *Rollaston v. New*, 640

LIABILITY OF INDIVIDUAL SHAREHOLDERS.

See INSURANCE COMPANY.

LIMITATION OVER.

See WILLS, 15.

LIMITED AGENCY.

See JOINT STOCK COMPANIES, 4.

LIMITED COMPANIES.

Where a limited company was Plaintiff—*Held* that a bond for 100*l.* was sufficient security for costs within the meaning of the Joint Stock Companies Act, 1857, s. 24. *The Australian Steam Ship Company (Limited) v. Fleming*, 407

LONDON, FREEMAN OF.

See WILLS, 2.

LORD'S DAY, THE.

See CHARTER.

LORDS, HOUSE OF.

See JURISDICTION, 2.

LOST GRANT.

See CROWN RIGHTS.

MAINTENANCE AND ADVANCEMENT.

See POWERS, 1.

MANORS.

See COPYHOLDS.
CROWN RIGHTS.

MARRIAGE, REPRESENTATIONS PREVIOUS TO.

See SETTLEMENT, 1.

MARRIED WOMAN.

See FEME COVERTE.

MEETING, GENERAL, OF COMPANY.

See COMPANY, 1.

MERCHANT SHIPPING ACT, 1854.

1. The limitation of liability provided for a shipowner by the 504th section of the Merchant Shipping Act, 1854, where loss or damage is occasioned by his ship to any other ship, or to the goods on board any other ship—*Held*, not to apply to a case of collision between two American ships upon the high seas.

And the Court refused to take judicial cognisance that the law of America is, in this respect, the same as our own.

But if that circumstance be averred and proved, the Court can administer American law between Americans—*semble*. *Cope v. Doherty*, 367

2. A mortgagee of a ship has power, under the 70th section of the Merchant Shipping Act, 1854, to use, as well as sell, the ship—*semble*.

Where a mortgagee claimed under a special contract, which did not contemplate a sale by him until two months had elapsed after a demand for payment—*Held*, upon the construction of the agreement, and especially having regard to the circumstance that the ship would otherwise remain useless in that interval, that he was at liberty to use the ship.

In such a case, the circumstance of the mortgagee being registered as absolute owner is not conclusive as to the rights of the parties.

Further observations as to the power of the Court, under the Merchant Shipping Act, 1854, to recognise equitable rights in a ship as distinguished from those of the registered owner. *The European and Australian Royal Mail Company (Limited) v. The Royal Mail Steam Packet Company*, 676

3. The value of a ship, within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 504), is, what she would have fetched if sold immediately before the collision, without deduction in respect of costs of sale.

Therefore, when a ship had run down another and was afterwards sold, and her owners claimed the benefit of the Act—*Held*, that they were accountable for the gross proceeds of the sale, without deduction in respect of disbursements and fees retained by the Admiralty Commissioners, *Leycester v. Logan*, 725

MERGER.

See COPYHOLD, 2.
MORTGAGE, 1.

MORTGAGE.

MINES.

See CROWN RIGHTS.
MORTGAGOR AND MORTGAGEE.

MINING COMPANY.

See MORTMAIN, 1.

MINING LEASE.

See LESSOR AND LESSEE.

"MINORITY," MEANING OF.

See WILLS, 15.

MISREPRESENTATION.

See INSURANCE COMPANY.

MISTAKE OF FACT, PAYMENT UNDER.

See EXECUTORS, 1.

MONEY PAYMENT.

See CHARTER.

"MONEYS," CONSTRUCTION OF.

See WILLS, 8.

MORTGAGE.

Tenant in tail in remainder expectant upon a preceding estate tail, purchased a mortgage on the estate and took an assignment to himself of the mortgage debt and of the term by which it was secured. He subsequently became entitled to the estate as tenant in tail in possession, and as such continued for six years in receipt of the rents; after which

he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge—*Held*, that the charge was kept alive for the benefit of his personal representative.

Distinction in this respect where tenant in tail becomes entitled to the charge without any act on his part.

Dictum of Sir *W. Grant* in *Forbes v. Moffat* (18 Ves. 393) explained. *Horton v. Smith*, 624

See CHARGING ORDER.
CREDITORS' SUIT, 1.

MORTGAGE OF SHIP.

See SHIPPING COMPANY.

MORTGAGOR AND MORTGAGEE.

Where a trespass was committed on Plaintiffs' mine, and an air-course and level roads made through it underground to connect adjoining collieries in mortgage to Defendants, and large quantities of Plaintiffs' coal were thereby fraudulently gotten and removed without their knowledge—*Held*,

First. That the Defendants, the mortgagees, could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding the proceeds of the coal, so wrongfully removed by him, had found their way week by week, but without notice of the fraud, into Defendants' hands, and notwithstanding they continued the use of the air-course and roads after taking possession, and retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated.

Secondly. That this Court had no jurisdiction to give the Plaintiffs compensation in respect of consequential injury by reason of large portions of their coal being rendered unworkable and useless to them; but,

Thirdly. That Defendants, the mortgagees, could not be allowed to retain the user of the air-course or roads, although the continuance of that user might be no special injury to the Plaintiffs; but,

Fourthly. That, not having themselves made such apertures, defendants could not be ordered to fill them up.

Fifthly. That, all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not in this Court be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction.

Form of order, under such circumstances, and of decree for an account against the mortgagor and mortgagees, and as to the allowances to be made to Defendants in respect of the coal for which they were held accountable.

If won by Defendants in such a manner as seriously to injure the rest of the Plaintiffs' coal, Defendants would be entitled to no allowance for winning such coal—*Semble*.

Whether, under such circumstances as the above, the onus is not upon persons in the position of the mortgagees to show how much coal had been abstracted by themselves, and how much by others before they took possession—*Quere*.

Distinction, as regards the jurisdiction of this Court, between damages as such, and wrongs attended with profit to the wrongdoer. *Powell v. Aiken*, 343

See MERCHANT SHIPPING ACT, 1854.

782 MORTGAGEE.

MORTGAGEE, INFANT.

See TRUSTEE ACT, 1850.

MORTMAIN.

Shares in Mining Companies conducted on the cost-book principle—*Held*, not within Stat. of Mortmain, 9 Geo. 2, c. 36, the mines being vested in trustees for the purposes of the undertaking generally, and not in trust for the individual shareholders; and the interest of the shareholders being limited to the profits derived from working the mines. *Hayter v. Tucker*, 243

See WILL, 11, 12.

MOTION TO DISSOLVE.

See INJUNCTION, 1.

MOTION TO STAY TRIAL.

See BILL FOR DISCOVERY.

MUNICIPAL LAW.

See INTERNATIONAL LAW.

NEW TRIAL.

See ISSUE.

NEXT OF KIN.

See WILL, 10.

NOTARIAL SEAL.

See EVIDENCE.

NOTARY PUBLIC.

See EVIDENCE.

PATENT.

NOTICE.

See BANKRUPTCY, 1.
CHARGING ORDERS.

NUISANCE.

See PUBLIC WORKS.

ONUS OF PROOF.

See COMPANY, 1.

ORDER OF PROTECTION.

See FEME COVERTE, 2.

ORDERS OF COURT.

1828. *April 3. Order 40.*

See LIMITED COMPANIES.

1858. *August 7. Order 3.*

See ENROLMENT OF DECREE.

PATENT.

1. In a suit for the infringement of a patent, where the Court considers the Plaintiff entitled to full costs as between solicitor and client, the decree or order should contain an express direction that the costs be so taxed, notwithstanding the 43rd section of the Patent Law Amendment Act, 1852, provides that he shall have such full costs, unless the Judge shall certify that he ought not to have them. *Lister v. Leather*, 425

2. The rule in patent cases, that this Court cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that, since an

PATENT.

interim injunction was moved for, the Defendants have sold articles which, had the facts and law been then sufficiently ascertained, the Court would have restrained them from selling. *Price's Patent Candle Company (Limited) v. Bauwen's Patent Candle Company (Limited)*, 727

PARLIAMENTARY STOCK.

See EAST INDIA STOCK.

PARTITION OF MANORS.

See COPYHOLDS, 2.

PARTNERSHIP.

See AUTHOR AND PUBLISHER.

PAYMENT OF MONEY INTO COURT.

See TRUSTS AND TRUSTEES, 1.
WILLS, 4.

PEERAGE.

See JURISDICTION, 2.

PERPETUAL RENEWAL.

See LEASE, 1.

PETITION, UNDER 6 & 7 VICT. C. 73.

See ATTORNEY AND CLIENT, 1.

PLEADING.

Where there is a specific averment, an interrogatory founded thereon must be specifically answered. A general denial is not a sufficient answer to a specific charge.

POWERS.

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Therefore, where the averment was, that land was conveyed to one J. S., and the interrogatory was whether such land was not conveyed to one J. S., "or to some and what person or persons?"—*Held*, that an answer, stating conveyances to persons other than J. S., and adding that, save as therein appeared, the person answering could not set forth whether the land in question was or not conveyed to one J. S., or to some or what person or persons, was evasive. *Earp v. Lloyd*, 58

POLICY OF ASSURANCE.

See INSURANCE COMPANY.

POLICY, PUBLIC.

See PUBLIC POLICY.

POWERS.

Proceeds of the sale by an infant of his commission in the army, purchased three months previously at his request by his trustees, under a power to raise money for his maintenance and advancement, out of a fund in which he had only a contingent interest:—*Held*, in the absence of fraud, to belong to the infant, although the trustees' object in exercising the power had failed ab initio. *Lawrie v. Banks*, 142

POWERS OF APPOINTMENT.

See WILLS, 5.

POWERS OF DISTRESS AND ENTRY.

See SETTLEMENT, 1.

POWERS TO APPOINT NEW TRUSTEES.

See TRUSTS AND TRUSTEES, 1.

PRACTICE.

See BILL FOR DISCOVERY.

COSTS.

ENROLMENT OF DECREE.

EVIDENCE.

INJUNCTION, 1.

ISSUE.

PRODUCTION OF DOCUMENTS, 2.

SECURITY FOR COSTS, 1.

SETTLED ESTATES ACT.

PREFERENCE SHARES.

See COMPANY, 1.

PRESCRIPTION.

See CROWN RIGHTS.

PRESUMPTION.

See ADVANCEMENT OR PROVISION.

PRIORITY.

See CHARGING ORDER.

BANKRUPTCY, 1.

PRIVATE RIGHTS.

See PUBLIC WORKS.

PRIVILEGED COMMUNICATIONS.

See PRODUCTION OF DOCUMENTS, 1.

PRODUCTION OF DOCUMENTS.

1. Answers to inquiries addressed by Defendants to their agent in the

Falkland Islands by direction of their solicitor, for the purpose of procuring evidence in support of Defendants' case, are within the rule as to protection.

The true test in such cases is, not whether the person who is at a distance and transmits the information is the agent of the solicitor and sent out by him, but whether in transmitting that information he was discharging a duty which properly devolved on the solicitor, and which would have been performed by the solicitor had the circumstances of the case admitted of his performing it in person. *Lafone v. The Falkland Islands Company*, 34

2. Upon motion on behalf of a Defendant in a suit, for production by the Plaintiff of a document of which the Plaintiff had obtained production by an order against his Co-defendant, the Court refused to make an order in the absence of the latter.

But, *semble*, the mere circumstance of the Plaintiff having obtained the document for a specific and limited purpose would not have entitled him to have it protected on the ground of an implied confidence that it should not be used for any other purpose—*Reynolds v. Godlee*, 88

PROFITS A PRENDRE.

See CROWN RIGHTS.

PROTECTION, ORDER OF.

See FEME COVERTE, 2.

PROVISION.

See ADVANCEMENT OR PROVISION.

PUBLIC COMPANY.

PUBLIC COMPANY.

See COMPANY, 1.

PUBLIC POLICY.

See HUSBAND AND WIFE, 1.

PUBLIC WORKS.

Public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer (*e. g.*, by remaining undrained) unless his rights are invaded, is one which this Court cannot take into consideration.

The council of the borough of *Birmingham* were bound by a local Act of Parliament, incorporating The Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town—*Held*, that they were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town and where it belonged to the plaintiff.

Held also that, assuming the inhabitants of *Birmingham* to have had before their Act a right to drain their houses into the river, that circumstance would not authorise the council in discharging the sewage in such a manner as to subject the Plaintiff to the inconvenience of which he now complained.

Held further that, although Plaintiff had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the

REAL ESTATE. 785

ground of laches from now applying for an injunction, the rule in such cases being, that the mere prospect of injury does not give a right to this relief. *The Attorney-General v. The Council of the Borough of Birmingham*, 528

PUBLISHER.

See AUTHOR AND PUBLISHER.

VENDOR AND PURCHASER, 1.

PURPRESTURE.

See SEA SHORE.

RAILWAY COMPANY.

1. Where purchase money had been paid into Court by the *Bristol and Exeter* Railway Company and invested in stock—*Held*, on the construction of the company's Act, that the Court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, notwithstanding they might have been ordered under the Act to pay much larger costs, had the petition prayed a reinvestment in land. *In re The Bristol and Exeter Railway Act*, 6 & 7 Will. 4, c. 36, and *In re Land's Trust*, 81

2. The like decision upon a similar Act, in a matter transferred from the Exchequer, notwithstanding *In re Robertson* (23 Beav. 433). *Mauseley's Trust, In re*, 86 n.

See COMPANY, 1.

REAL ESTATE RESULTING AS PERSONALTY.

See CONVERSION.

RECEIVER.**RECEIVER.***See JURISDICTION, 2, 3.***RECITAL.***See SETTLEMENT, 1.***REDEMPTION SUITS.***See COSTS, 4.***REMEDY, CUMULATIVE.***See COMPANY, 1.***RENEWAL, PERPETUAL,
OF LEASE.***See LEASE, 1.***RENT CHARGE.***See SETTLEMENT, 1.***REPUBLICATION OF WILL.***See WILLS, 14.***RESIDUARY DEVISEE.***See WILLS, 6.***RESULTING TRUST.***See ADVANCEMENT OR PROVISION.
CONVERSION.***RETIRING FROM A TRUST.***See TRUSTS AND TRUSTEES, 1.***SEA SHORE.****REVOCATION.***See WILLS, 1, 15.***RIVERS, PUBLIC AND
PRIVATE.***See PUBLIC WORKS.***ROYAL FORESTS.***See CROWN RIGHTS.***SEAL, NOTARIAL.***See EVIDENCE.***SEA SHORE.**

Where the Crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if the Defendant disputes the Crown's title to the soil between present high and low watermark, the Court will direct issues to try that right before inquiring how far in former times the ancient high watermark extended inland: And this course will be adhered to, notwithstanding the hardship it may impose upon the Defendant, who, by admitting the soil on which he has done acts of ownership to be part of the foreshore, will in effect have proved the case of the Crown in the event of his failing to satisfy a jury that a grant must be presumed.

But if, in a case like the above, the Defendant admits the Crown's title to the soil between present high and low watermarks, then, upon an inquiry what is the boundary of the foreshore, the onus would be thrown upon the Crown of showing that the high watermark in former times extended further inland than at present.—*Semble. Attorney-General v. Chamberlaine,* 292

SECURITY FOR COSTS.

Where it is not clear upon the face of the bill that Defendant is entitled to security for costs, Defendant, by applying for further time to answer, does not waive any right that he may have to such security upon grounds dehors the bill, and not discovered by him when he applied for further time, although they might have been so discovered had he made inquiry.

Plaintiff, described in bill as of *Africa*, now residing at a given address in *England*, ordered, under the circumstances, to give security for costs, notwithstanding Defendant had applied for further time to answer, and might, before making that application, have ascertained the facts on which the order was made.

Swanzy v. Swanzy, 237

See LIMITED COMPANIES.

SEISIN IN FEE, RECITAL OF.

See SETTLEMENT, 1.

SEPARATION, ARTICLES OF.

See HUSBAND AND WIFE, 1.

SETTLED ESTATES ACT.

Where land is sold pursuant to an order of the Court under the Settled Estates Act, 19 & 20 Vict. c. 120, the conveyance must be settled by the Judge, whether the parties differ or not.

But where land is to be sold in lots, and one conveyance has been settled by the conveyancing counsel of the Court, it may be adopted by the chief clerk for all the rest, in which no special circumstances exist

to render such a course improper. *In re Eyre's Settled Estates*,

SETTLEMENT.

By antenuptial settlement in 1835, reciting that upon the treaty for the intended marriage *P. M.* (uncle of the intended husband) agreed to secure in manner and subject as thereafter expressed to *S. M.* (the intended wife), after his own and his nephew's decease, an annual sum of 300*l.* for her jointure, to be issuing and payable out of the hereditaments thereafter charged therewith, and of or to which *P. M.* was seised or entitled in fee simple, *P. M.* did give, grant, bargain, sell, and confirm to *S. M.* and her assigns one annual sum or yearly rentcharge of 300*l.*, to be charged upon and yearly issuing and payable out of all and singular the manors of (mentioning certain manors), and also all and singular the hereditaments in the several parishes of (naming certain parishes), of or to which *P. M.* or any person in trust for him was seised or entitled for an estate of inheritance at law or in equity,—*Habendum* to *S. M.* during her life in part of her jointure; and *P. M.* covenanted, for himself, his heirs, and assigns, that, in case the same should be in arrear, it should be lawful for *S. M.* to enter into and distrain upon the premises, and to hold and enjoy the same, and receive the rents as therein mentioned, until the arrears were paid. And for better securing the said rentcharge *P. M.* did thereby bargain, grant, sell, demise, and confirm the premises to trustees for a term of years, upon the usual trusts for that purpose. After *P. M.*'s death it appeared that he had only had an estate for life in the premises:—

Held, by the Vice-Chancellor, assisted by Barons *Bramwell* and *Watson*, that there was not in the settlement any covenant on which the grantee or the trustees of the term could maintain an action.

[Upon this point the decision was reversed on appeal by Lord *Chelmsford*, C., *see Addendum*, x.]

And *held* by the Vice-Chancellor, that there being no covenant in the settlement on which an action could be maintained at law, there was no separate equity which this Court could fasten upon the conscience of the settlor.

The rule, that parties making representations, upon the faith of which a marriage is afterwards solemnised, must make good such representations, does not apply to a case like the above. *Monypenny v. Monypenny*, 174

See FEME COVERTE.

SHAREHOLDERS, LIABILITY OF.

See INSURANCE COMPANY.

SHARES.

See COMPANY, 1.

SHIPPING.

See MERCHANT SHIPPING ACT, 1854.

SHIPPING COMPANY.

Directors of a shipping company, with limited liability, having power by the company's articles of association to do all such acts as the company might do, not being acts which the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), or

the company's articles of association required to be done by the company in general meeting, have power to borrow money for the purposes of the company by mortgaging the company's ships. *Australian Auxiliary Steam Clipper Company (Limited) v. Mounsey*, 733

SHORE OF THE SEA.

See SEA SHORE.

SOLICITOR AND CLIENT.

See ATTORNEY AND CLIENT.

PRODUCTION OF DOCUMENTS, 1.

SPECIFIC PERFORMANCE.

See FEME COVERTE.

HUSBAND AND WIFE, 1.

VENDOR AND PURCHASER, 1.

STATUTES, DECISIONS UPON.

13 ELIZ. c. 7.

See BANKRUPTCY, 1.

1 JAC. 1, c. 15.

See BANKRUPTCY, 1.

11 GEO. 1, c. 18.

See WILLS, 2.

9 GEO. 2, c. 36.

See MORTMAIN, 1.

WILLS, 11, 12.

46 GEO. 3, c. 135.

See BANKRUPTCY, 1.

55 GEO. 3, c. 192.

See CORNWALL.

3 & 4 WILL. 4, c. 74.

See FEME COVERTE.
TRUSTEE ACT, 1850.

3 & 4 WILL. 4, c. 105.

See DOWER.

5 & 6 WILL. 4, c. 54.

See ADVANCEMENT OR PROVI-
SION.

1 VICT. c. 26, s. 27.

See WILLS, 5.

1 & 2 VICT. c. 43.

See CROWN RIGHTS.

1 & 2 VICT. c. 110.

See CHARGING ORDER.

5 & 6 VICT. c. 100.

See COPYRIGHT, 1.

6 & 7 VICT. c. 73, ss. 37 & 43.

See ATTORNEY AND CLI-
ENT, 1.

7 & 8 VICT. c. 110, s. 44.

See JOINT STOCK COMPA-
NIES, 4.

7 & 8 VICT. c. 111.

See JOINT STOCK COMPANIES'
WINDING-UP ACTS.

8 & 9 VICT. c. 16, s. 120.

See COMPANY, 1.

10 & 11 VICT. c. 34.

See PUBLIC WORKS.

10 & 11 VICT. c. 96.

See TRUSTS AND TRUSTEES, 1.
WILLS, 4.

11 & 12 VICT. c. 45.

See JOINT STOCK COMPANIES'
WINDING-UP ACTS.

13 & 14 VICT. c. 60, s. 7.

See TRUSTEE ACT, 1850.

15 & 16 VICT. c. 83, s. 43.

See PATENT, 1.

15 & 16 VICT. c. 86, s. 22.

See EVIDENCE.

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15 & 16 VICT. c. 86. s. 50.

See JURISDICTION, 5.

16 & 17 VICT. c. 34.

See INCOME TAX.

17 & 18 VICT. c. 104.

See MERCHANT SHIPPING
ACT, 1854.

19 & 20 VICT. c. 47.

See SHIPPING COMPANY.

19 & 20 VICT. c. 120.

See SETTLED ESTATES ACT.

20 & 21 VICT. c. 14, s. 24.

See LIMITED COMPANIES.

20 & 21 VICT. c. 78.

See INSURANCE COMPANY.
JOINT STOCK COMPANIES
WINDING-UP ACTS.

20 & 21 VICT. c. 85, ss. 21 & 26.

See FEME COVERTE, 2.

STATUTES OF DISTRI-
BUTION.

See WILLS, 2, 16.

STATUTES OF LIMITATION.

See CROWN RIGHTS.
EXECUTORS, 1.

STANDING ORDERS OF PAR-
LIAMENT, FRAUD ON.

See JOINT STOCK COMPANIES WIND-
ING-UP ACTS, 2.

STEREOTYPE.

See AUTHOR AND PUBLISHER.

STOCK, EAST INDIA.

See EAST INDIA STOCK.

STOCK, PURCHASE OF, IN
JOINT NAMES.

See ADVANCEMENT OR PROVISION.

SUBSTITUTIONAL BEQUEST.

See WILLS, 3, 7.

SURRENDER TO USE OF
WILL.

See CORNWALL.

SURVIVORSHIP.

See INVESTMENTS IN JOINT NAMES.

TAMPERING WITH DEED.

See JOINT STOCK COMPANIES, 1.

TENANCY IN COMMON.

See INVESTMENTS IN JOINT NAMES.

TENANT IN TAIL.

See MORTGAGE, 1.

"THEN," CONSTRUCTION OF.

See WILL, 10.

TIMBER.

TIMBER.

See JURISDICTION, 4.

TOWNS IMPROVEMENT CLAUSES ACT, 1847.

See PUBLIC WORKS.

TRADE MARK.

1. Perpetual injunction to restrain a printer from printing or selling labels similar to those used by Plaintiff as his trade mark, notwithstanding the possibility that some labels so printed and sold might be purchased bonâ fide and for the purpose of being applied to articles of Plaintiff's own manufacture, from which his labels had been lost.

Defendant, insisting on an adverse right, after being made aware that the Plaintiff had been defrauded through his agency, ordered to pay the costs of all the proceedings, both at law and in equity.

Observations of Lord *Cranworth*, C., in *Farina v. Silverlock* (6 D. M. G. 214) explained. *Farina v. Silverlock*, 650

2. Injunction to restrain the sale in bottles stamped with Plaintiffs name and address, followed by the words "genuine superior aerated waters," of soda water not manufactured by Plaintiff, dissolved;—the Court being of opinion, upon the evidence, that Defendant was not shown to have used the bottles either with an intention, or so as in fact, to mislead the public.

But the user of such bottles, so as in fact, to mislead the public, although unintentionally, would be restrained:—*Obiter*.

Whether or not the onus was thrown upon Defendant of informing

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the public that it was not Plaintiffs' soda water he was selling—*Quære. Welch v. Knott*, 747

TRESPASS.

See MORTGAGOR AND MORTGAGEE.

TRIAL, NEW.

See ISSUE.

TRIAL OF ISSUE.

See ISSUE.

TRUSTEE ACT, 1850.

A mortgagee in fee of real estate having died intestate as to the mortgaged premises, which descended on his death to his infant heir, the Court, upon petition by his executors, one of whom was a married woman, made an order under the Trustee Act, 1850, vesting the legal estate in the petitioners, to such uses as they should appoint, and, in default, to the use of petitioners in fee, subject to the equity of redemption:—in order to enable them to reconvey to the mortgagor without the necessity of having the deed acknowledged by the married woman under the Act 3 & 4 Will. 4, c. 74. *In re Powell*, 838

TRUSTEE RELIEF ACT.

See TRUSTS AND TRUSTEES, 1.
WILLS, 4.

TRUSTS AND TRUSTEES.

1. A trustee who had paid money into court under the Trustee Relief

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Act (10 & 11 Vict. c. 96),—*Held* to have retired from his trust, and a new trustee *held* to have been duly appointed in his stead under a power for that purpose, to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement." *In re William's Settlement*, 87

2. Trustees for sale on decease of tenant for life having a prior legal estate—*Held*, not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of proceedings against them at law and in equity in reference thereto, notwithstanding such sale was attempted upon the solicitation of the tenant for life, and with the consent and approbation and by the direction of the cestuis que trust, one of whom was sui juris, the shares of the others, who were married women, being settled to their separate use without power of anticipation. *Leedham v. Chauener*, 458

See JURISDICTION, 3.
POWERS, 1.
WILLS, 4, 12.

TRUSTS, RESULTING.

See ADVANCEMENT OR PROVISION.

TRUSTS, VOLUNTARY.

See VOLUNTARY TRUST, 1.

ULTRA VIRES.

See JOINT STOCK COMPANIES, 3.
JOINT STOCK COMPANIES WIND-
ING-UP ACTS, 2.

USES TO BAR DOWER.

See DOWER.

VOLUNTARY TRUST.

VENDOR AND PURCHASER.

Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract; and a mere devise of trust estate does not in such a case avoid the necessity of a suit.

Distinction in this respect between suits rendered necessary as above by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate leaving an infant heir. *Purser v. Darby*, 41

VESTING.

See WILLS, 15.

VESTING ORDER.

See TRUSTEE ACT, 1850.

VOLUNTARY TRUST.

A. V., a merchant in China, directed his correspondents in London to transfer 1,000*l.* from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents, "that he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children," "that he had appropriated it to them, and his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed "A. V., Esq., exchange account on account of children," previously informing him of their intention so to do—*Held*, that by

the first letter a trust was well created in favour of the children, although the fund was still so far in the control of *A. V.* as to be liable to his drawing; and notwithstanding *A. V.*, in one of the letters, had desired his correspondents to consider it as "subject to the order of his executors" in the event of his death.

The authorities on this subject examined, and *Gaskell v. Gaskell* (2 You. & J. 502) explained. *Vandenberg v. Palmer*, 204

WASTE.

See JURISDICTION, 2, 4.

WIDOW.

See DOWER.

WIFE.

See HUSBAND AND WIFE, 1.

WILLS.

1. Testatrix by her will bequeathed a sum of money to trustees upon trust to accumulate for a period exceeding what the law allows, and to pay and divide the principal sum, interest, and accumulations unto and amongst a certain class, with a power of advancement in favour of sons. By a codicil, after reciting that she had by her will bequeathed this sum upon trust to accumulate, and to pay and divide the same sum and all accumulations thereof in manner therein mentioned, she directed, that, in lieu of the accumulation and disposition made thereof by her will, the trustees should accumulate for twenty-one years after her decease, and should stand pos-

sessed of the principal money, interest, and accumulations upon trust for such of the class as should be then living. The codicil did not repeat the power of advancement, but concluded by confirming the will in every particular in which the same was not thereby altered:—*Held*, that the power of advancement was a valid and subsisting power, and was not revoked by the codicil. *Hill v. Walker*, 166

2. If a freeman of the City of *London* dies leaving a will, but without having appointed an executor, so much of his personal estate as he has not disposed of by his will must be distributed according to the custom of *London*, and not according to the Statutes of Distribution.

Bequest of leaseholds by a freeman of *London* to his wife for life, and no executor appointed—*Held*, that the residue of the term was distributable according to the custom, and not according to the Statutes of Distribution. *Chappell v. Haynes*, 163

3. Where there is a bequest to *A.* for life, and after his decease to *B.* "or his personal representatives," or a bequest to *B.* to be paid so many months after testator's death to *B.* "or his personal representatives," the Courts have construed it simply as another way of giving *B.* a vested interest upon the testator's death; and *B.* dying before the testator, the bequest has been held to lapse; but if, instead of "personal representatives," the word "heirs" be used, it shows the testator intended the persons he designates as "heirs" to take by way of substitution whenever *B.* may die, and there shall be no lapse although *B.* should die before the testator.

Bequest of residue to *A.* for life,

and in her last will a legacy to B. "or his heirs"—*Held*, that the legacy to B. did not lapse by reason of his death in the lifetime of the testatrix, but that his widow and only child took by substitution. *In re Porter's Trust*. 188

4. Testator by his will declared it should be in his trustees' discretion to advance all or any part of the principal of a fund to his son, or to his children, if he should be dead, in or towards his or their maintenance or advancement in the world, it being his wish that his son if living should have the whole benefit of such moneys if he should conduct himself steadily and to the satisfaction of his trustees: with gifts over, in the event of the whole of such moneys not having been advanced by the trustees. The son having assigned his interest under the will, the trustees, after the widow's death, paid the fund into Court under the Trustee Relief Act, but did not suggest that the son had conducted himself otherwise than steadily and to their satisfaction—*Held*, first, upon the construction of the will, that this was, in effect, a trust for the son with a power for the trustees to deprive him of the fund if he should not conduct himself steadily and to their satisfaction; secondly, that, the trustees having declined to exercise that power, it was not competent to this Court to exercise it; and the fund was ordered to be transferred to the assignee. *In re Coe's Trust*, 199

5. By a marriage settlement, leaseholds were settled upon trust for wife for life for her separate use, and after her decease upon trust as husband should by deed or will appoint, and subject thereto upon trust for such person, &c., as under the Statutes of

Distribution might be entitled thereto. The husband by his will in 1850, after making certain provision for his only child, as to all other his estate, property, and effects whatsoever and wheresoever, which he should be possessed of, interested in, or entitled to at his decease, subject, as to such parts thereof as were comprised in the settlement, to that settlement and the trusts thereby declared, and which indenture he thereby ratified and confirmed in all respects, gave and bequeathed the same to his widow absolutely.—*Held*, that the general residuary bequest operated as an execution of the power of appointment reserved by the settlement. *Hutchins v. Osborne*, 252

6. Bequest to executors of a sum of money "to be chargeable and paid as thereafter mentioned," upon trust for testator's wife for life, remainder for his children; then a gift of certain freehold and leasehold property to his nephew, "subject to the payment" of the said sum and to testator's debts; with a residuary devise and bequest to the wife absolutely—*Held*, as between testator's widow and his nephew, that the sum was a charge on the gift to the nephew, and not an exception out of that gift; and testator never having had any child, the sum, subject to the widow's life interest, belonged to the nephew; the principle being, that, where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burthen, which, in the events that have happened, the testator no longer intended him to bear.

Test in all such cases:—Is the thing in question excepted out of the devised property—in other words,

did testator mean to give that property *minus* the thing in question; or is it a charge on that property? If the former, then, the purpose failing, it goes to the residuary devisee; if the latter, to the devisee of the property charged.

Whether a sum of money to be paid out of an estate has ever been held to be an exception—*Quære*.
Tucker v. Kayess, 339

7. Bequest of a legacy to the Plaintiff for her sole use and benefit; “and, in the event of her death, then” bequest thereof to her youngest surviving son—*Held*, that the event contemplated was a death in testator’s lifetime; and that the Plaintiff, having survived him, was entitled absolutely.

Lord Douglas v. Chalmers (2 Ves. J. 501) observed on. *Schenk v. Agnew*, 405

8. The word “moneys” in a codicil—*Held*, to comprise not only all moneys in hand, but also all moneys due to testator, whether upon security or otherwise, notwithstanding express mention made in the will of “moneys and securities for money.”
Langdale v. Whitfield, 426

9. Devise of *Black Acre* to Defendant for life, made conditional upon his confirming the disposition in the will of such of the hereditaments thereafter devised as were the property of testator’s late brother *S. U.*, deceased, followed by a residuary devise of “all and every the manors and hereditaments, being freehold of inheritance, of or to which testator was then, or at his death should be, seised or entitled at law or in equity for any devisable estate or interest, or of which testator then had or at the time of his de-

cease should have power to dispose by will, including lands known as *Duchy lands*,” as to *White Acre*, and two other estates, to uses for securing an annuity to an annuitant for life, and as to all and singular the same manors and hereditaments (subject as to the three last-mentioned estates to the uses thereinbefore limited) to use of Plaintiff for life:—*Held* (following *Wintour v. Clifton*, 3 Jur. N. S., 74), that Defendant was bound to elect between *Black Acre* and certain *Duchy lands*, of which *White Acre* was one, and which stood limited to *S. U.* for life, with remainder to testator for life, with remainder to Defendant for life, with remainders over for life and in tail, with ultimate remainder to testator in fee; testator having no other *Duchy lands*.

Whether, if *White Acre* had not been mentioned, a case of election would have been prevented from arising, upon the ground that the testator contemplated the possibility of acquiring other *Duchy lands* in the interval between the date of his will and his death—*Quære*. *Usticke v. Peters*, 437

10. Testator bequeathed a mixed residue, upon trust, as to one moiety, for his daughter *Mary* for life, with remainder for her children; and as to the other moiety, for his daughter *Sarah* for life, with remainder for her children, with cross remainders, and proceeded thus:—“And in case both my said daughters should die without issue, or, leaving such, all should die under twenty-one without leaving issue, then I direct my trustees to pay one moiety unto the person or persons that shall then be considered as my next of kin and personal representative or representatives, agreeable to the order of the

Statutes of Distribution, and the other moiety unto the person or persons that shall *then* be considered the next of kin and personal representative or representatives of my late wife *Sarah*, agreeable to the order of the Statutes of Distribution." At the date of his will, his daughter *Sarah* was the only child and sole next of kin of his late wife *Sarah*. The daughters survived the testator, and died without issue.

Held, that the persons entitled to the second moiety were those who, at the death of the surviving daughter, were the next of kin, according to the statute, of testator's deceased wife; and, having regard to the juxtaposition of the bequests, that the persons entitled to the first moiety were those who, at the same period, were the next of kin, according to the statute, of the testator.

Review of the authorities as to the time when the persons taking under bequests of this description are to be ascertained. *Wharton v. Barker*, 483

11. Devise of land for the erection of a school-room and offices, followed by a bequest of 400*l.* upon trust to expend the same, or such part thereof as might be necessary in the erection of a school-room and requisite offices; and in case any part of the said 400*l.* should not be expended for that purpose, the same to be laid out in certain repairs—*Held*, that the whole bequest was void under the statute 9 Geo. 2, c. 36, the executors not having any alternative, the first trust being express, but to apply part at least of the 400*l.* in a manner forbidden by the statute; and, inasmuch as the whole of so small a sum might well have been employed in building a school, an inquiry how much would

have been sufficient for that purpose, as suggested in *Chapman v. Brown* (6 Ves. 404), would be useless. *Cramp v. Playfoot*, 479

12. Devise of a house to the inhabitants of B. to found a lying-in asylum, the executors to call a meeting of the inhabitants within a mile round the house to appoint a committee and trustees to carry out the same; testator's godson to be one of the said trustees. "But in the event of the said inhabitants not appointing a committee, or not [being] willing to carry out the same scheme," then a devise over to testator's godson:—*Held*, upon the principle of *Jones v. Westcomb* (Prec. Ch. 316) and *Avelyn v. Ward* (1 Ves. sen. 420), that the devise over was valid, notwithstanding the circumstance that the prior devise failed to take effect by reason of the Statute of Mortmain, and not in the manner contemplated by the testator.

Observations on *The Attorney-General v. Hodgson* (15 Sim. 146) and *Philpott v. St. George's Hospital* (21 Beav. 134).

In such a case it is not competent to the trustees to determine whether the property shall go to the heir-at-law, or to the devisee, simply by performing, or abstaining from performing, a condition in the performance of which they can have no interest. *Warren v. Rudall*, and *Hall v. Warren*, 603

13. Direction in a will to pay and discharge all the just and lawful debts owing by a deceased brother at the time of his death—*Held*, upon the terms of the will, and looking to the circumstance that the brother had been dead about forty years at the date of the will, to comprise debts, but not interest. *Askew v. Thompson*, 620

14. A codicil appointing a new executor—*Held*, a republication of the will, and to give to the latter the effect of passing after-acquired lands.

The cases on this subject reconciled. *In re Earl's Trust*, 673

15. Where there is, in a will, a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, merely dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold, that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited.

But, in order that this rule of construction may be applied, the condition, upon which the limitation over is made dependent, must involve no incident but what is essential to the determination of the interests previously limited.

The onus is upon those who claim under a codicil, as against devisees under the will, to show that the intention to displace the devisee is equally clear with the original intention to devise.

If the whole tenor of a will be such as clearly indicates that the testator has used the word "minority" to mean the whole of the period during which he has kept a devisee out of the full control over the devised property, the Court may adopt that interpretation. Otherwise, the word must be strictly construed.

Testator by his will directed, that, when the youngest of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts, one part to be for his wife and one of the remaining two

for each daughter; at his wife's decease her share to be equally divided between his two daughters: and provided either of his two daughters should die before a division of the property should have been made, and having no issue, then the part of the deceased to be given to her surviving sister. By a codicil, *should both his children die in their minority* and leave no issue, then in such case, and in such case only, he gave the whole of his property to his wife for life, with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age, and without having been married.

Held, that, whether the interests under the will were vested or not, and whether a reasonable motive could or could not be assigned for the condition upon which the testator had made the limitation over in the codicil to depend (the death of both his daughters in their minority), that condition must be construed strictly; and the event not having happened, the limitation over—*Held*, not to take effect.

But, *semble*, the interests under the will were vested interests. *Maddison v. Chapman*, 709

16. Bequest of personalty "to the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control" — *Held*, that the persons to take were those who at the testator's death would have been entitled under the Statutes of Distribution to the personal estate of the deceased partner in case he had died intestate, and not the heir-at-law strictly so called. *In re Gamboa's Trusts*, 756

See CORNWALL.
INCOME TAX.
MORTMAIN, 1.

WITNESSES, EXAMINATION
OF.

See JURISDICTION, 1.

WOODWARDS, OR FOREST-
ERS OF THE CROWN.

See CROWN RIGHTS.

WORKS, PUBLIC.

• *See* PUBLIC WORKS.

WRONGS ATTENDED WITH
PROFIT.

See MORTGAGOR AND MORTGAGEE.





